88-1217

No. .....

Supreme Court, U.S.
FILED
JAN 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

CITY OF FORT LAUDERDALE, *et al.*,
Petitioners,

v.

A. A. PROFILES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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January 17, 1989

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QUESTION PRESENTED

I. Whether the action of the City of Fort Lauderdale, Florida in rezoning a parcel of property effected an unconstitutional taking of said property where the property owner failed to obtain a final decision regarding the application of the zoning ordinance to the property and where the property owner failed to seek just compensation through the procedures provided by the laws of the State of Florida.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the Petitioners, City of Fort Lauderdale, E. Clay Shaw, Jr., Virginia S. Young, Robert O. Cox, Richard A. Mills and John Allen.

The Respondent for this Court is A. A. Profiles, Inc.

The present Mayor of the City of Fort Lauderdale is Robert O. Cox. The present Commissioners of the City of Fort Lauderdale are Douglas H. Danzinger, Sheila Herrigan, Carlton Moore and James Naugle. The City Manager for the City of Fort Lauderdale is Constance W. Hoffman.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari be entered to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in these proceedings on August 1, 1988.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 850 F.2d 1483 (11th Cir. 1988) and is reproduced as Appendix 35a-47a to this Petition.

The denial of the Petition for Rehearing and Suggestion of Rehearing En Banc is reproduced as Appendix 48a.

The Order of the District Court (unpublished) is reproduced as Appendix 27a.

The Findings of Fact and Conclusions of Law of the District Court (unpublished) are reproduced as Appendix 13a-26a to this Petition.

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JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1). The Judgment of the Court of Appeals was entered on August 1, 1988. A timely Petition for Rehearing and Suggestion of Rehearing En Banc was denied on October 18, 1988. This Petition is timely filed pursuant to 28 U.S.C. Section 2101(c).

———o———

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when

the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

42 U.S.C. Section 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

STATEMENT OF THE CASE

In 1979 A. A. Profiles, Inc. (PROFILES) entered into a contract for the purchase of a twenty-eight (28) acre tract of land in the northwest section of Fort Lauderdale, Florida. The land was zoned M-1, the least restrictive industrial and manufacturing classification. The proposed use for the property was initially for a wood-chipping operation, where the by-products of landscaping and gardening would be transformed into chips for resale. The long-term intended use was for an industrial park.

The Code of the City of Fort Lauderdale required City Commission approval and the construction of a wall around the premises as outdoor storage of materials was contemplated. The approval process began with the submission of a proposal to the Planning and Zoning Department which included the erection of a wall. The proposal was presented at a public hearing and a favorable vote by the Planning and Zoning Board resulted. Based on this recommendation, which was conditioned on construc-

tion of the wall as a condition precedent to commencement of operations, the City Commission in turn conducted a public hearing on December 4, 1979. This resulted in the passage of Resolution No. 79-440 approving the establishment of the wood-chipping operation as a "conditional use".

PROFILES completed its financial arrangements and closed on the property before the end of the calendar year.

Building permits were obtained and work commenced on the site. This included clearing the site and preparing the site for construction of the wall.

Faced with serious cash-flow problems, PROFILES sought means for raising immediate funds. It seized upon the idea of accepting materials for which it would be paid, and storing these materials until the wall was completed and the wood-chipping operation commenced. Recognizing that the use was conditioned on the completion of the wall, PROFILES inquired of the City's Chief Building Inspector whether it could start receiving organic materials for storage, even though only the footers for the wall were in place. He advised that if these materials could be stored without complaint from the adjacent landowners he could see no problem, but if complaints were forthcoming collection of these materials would have to cease pending completion of the wall.

PROFILES then embarked on a widespread advertising campaign which solicited materials and which characterized the site as "Le Dump". This resulted in the receipt and storage of various types of materials, both organic and otherwise.

The characterization of the premises as "Le Dump" and the quantity and character of the materials received on the premises resulted in widespread complaints from adjacent landowners and from the citizenry at large. The Chief Zoning Inspector and the Assistant City Manager took preliminary steps to stop the dumping and on May 6, 1980, the Fort Lauderdale City Commission conducted a public meeting to address the problem. The City Commission voted to temporarily suspend its approval of the project and a stop work order was posted by the City's building official the following day.

Subsequent City Commission meetings were held on July 1, 1980, and July 30, 1980, where attempts were made to clarify or resolve the problem but no satisfactory solution was obtained. Following the July 30, 1980, meeting, PROFILES' legal representative made a public announcement that PROFILES had no intention of proceeding with the project until its legal position with the City was clarified.

The only action that was taken to "clarify" its legal position with the City was a letter written by PROFILES' counsel demanding payment for past damages and giving assurances that PROFILES had every intention of following through with its project.

PROFILES never tested the correctness of the stop work order through the administrative appeal process provided under Florida law, nor did it seek any permit or variance at any time.[1] (50a-58a)

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1. Despite the assurances contained in the August 15, 1980 letter that PROFILES had every intention of proceeding

(Continued on following page)

During this period of inactivity by PROFILES, its principal lender, Landmark First National Bank of Fort Lauderdale, instituted foreclosure proceedings which ultimately resulted in a final judgment of foreclosure on March 23, 1981.

On October 31, 1980 an application for rezoning was filed by Leola R. McCoy, who was a neighbor to PROFILES' premises. Despite the fact that notice of public hearings was furnished to PROFILES, it failed to appear. Finally, on March 10, 1981 the City Commission addressed McCoy's application for rezoning, and the property was rezoned from M-1 to B-C-3.[2] (73a-80a)

In addition to not appearing at any of the public hearings which culminated with the March 10, 1981 rezoning hearing, PROFILES never opposed the rezoning nor did it inquire formally or informally whether the ordinance had any application to PROFILES' use of the property and if it did what that application was. No permit was sought and no variance was requested.

(Continued from previous page)

with the project, the proof demonstrated that it lacked the financial ability to do so. A memo dated July 2, 1980 from Byron Prugh, Profiles' office manager, to its attorney presented the true situation: "At this writing, July 2, 1980, the very worst thing that could happen to us would be for the City to return our permit; we have no funds and are unable to do a thing. Riteco or Landmark [the mortgage holders] could foreclose any minute. Time is of the essence."

2. The B-C-3 classification permitted lighter industrial development, but this classification would likewise have required a wall for outside storage. It would have permitted an industrial park without the necessity of a wall. (73a-80a)

On August 3, 1981 this action was filed in the United States District Court for the Southern District of Florida. (1a-12a)

REASONS FOR GRANTING THE WRIT

I

THE HOLDING BY THE COURT OF APPEALS THAT THE REZONING OF PROFILES' PROPERTY 'UNDENIABLY CONSTITUTED A FINAL, DEFINITIVE POSITION' BY THE CITY OF FORT LAUDERDALE, FLORIDA, IN THE ABSENCE OF ANY EFFORT BY PROFILES TO DETERMINE THE APPLICABILITY OR EFFECT OF THE REZONING ORDINANCE TO ITS PROPERTY CREATES A DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND WITH THE DECISIONS OF THE COURTS OF APPEALS FOR THE SEVENTH AND NINTH CIRCUITS.

The ancillary holding by the Court of Appeals that Florida law provided no inverse condemnation remedy to a landowner whose property had been rezoned represents a misapprehension of Florida law and creates a direct conflict with decisions of this Court and with decisions of the Seventh, Ninth and Eleventh Circuit Courts of Appeals.

Additionally, this petition presents a question with significant impact on state law as the Court of Appeals misinterpreted Florida law on an issue of significant and widespread importance.

RIPENESS

A regulatory taking claim has two (2) components: (1) the establishment that the regulation has in substance "taken" property—that is that the regulation "goes too far," and (2) that any proffered compensation is not just. *MacDonald, Sommer & Frates v. Yolo County,* 106 S.Ct. 2561, 2566 (1986).

Absent finality as to both elements, federal review of an alleged regulatory taking is premature.

A.

Jurisdiction

Ripeness is an element of the case or controversy requirement of Article III of the Constitution that goes to subject matter jurisdiction of the court, and is a matter that must be addressed by the Court of Appeals. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 138 (1974); *Unity Ventures v. County of Lake,* 841 F.2d 770, 774 (7th Cir. 1988); *Shelter Creek Development Corp. v. Oxnard,* 838 F.2d 375, 377 (9th Cir. 1988).

B.

Administrative Finality

The first component part of a regulatory taking claim[3] requires that the property owner obtain "a final decision regarding the application of the zoning ordinance . . . to its property" otherwise "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been

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3. A regulatory taking includes rezoning. *Agins v. City of Tiburon,* 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621 (1981).

destroyed". *Williamson County Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186, 189, n. 11 (1985).

The Court of Appeals holding that "the rezoning ordinance undeniably constituted a final definitive position," is in direct conflict with these decisions of this Court, as well as in direct conflict with the Seventh and Ninth Circuits (43a).

A "final decision regarding the application of a zoning ordinance" requires (1) the rejection of a follow-up application for a permit or development plan, and (2) the denial of a variance. *Williamson County Planning Comm'n,* at pp. 182-192; 105 S.Ct. 3117-3119; *Unity Ventures* at 774, citing *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, 1454, amended 830 F.2d 968 (9th Cir. 1987); *Shelter Creek Development Corp.* at 378.

The landowner in this case took no action either after receiving notice of the application for rezoning, at the time that the hearings were being conducted, or following the rezoning to either oppose the proposed rezoning or to present a follow-up application for a permit or development plan or to seek a variance from its application to it.[4]

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4. The procedures available to PROFILES to determine whether the rezoning ordinance applied to its intended use of the property and/or to what extent the ordinance would have related to its use if applied are set out in the Fort Lauderdale City Code, Section 47-31, *et seq.*

PROFILES could have taken the straight forward approach and sought a building permit and if this were unavailing it could have taken an appeal to the Board of Adjustment to seek a determination of its status regarding a vested use by filling out the form provided in Section 47-31.3.

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In the absence of any action by the property owner to obtain a final decision regarding the application or scope of the zoning ordinance the taking claim is premature.

C.

Futility

This Court in *MacDonald,* 106 S.Ct. at 2568, n. 8, suggests that there may be a futility exception to the finality requirement. Administrative finality may be met where submission of a permit or plan and/or a request for a variance would be futile, and where "at least one meaningful application has been made". *Unity Ventures* at 775, citing *Kinzli* at 1454 and *Herrington v. County of Sonoma,* 834 F.2d 1488, 1495 (9th Cir. 1987).

As there is no suggestion that there was any meaningful application, this exception would have no application here.

D.

The Zoning Ordinance Had No Application to Profiles

The rezoning ordinance had no application to PROFILES under Florida law. PROFILES would have been entitled to continue its use of the property as originally contemplated as a "preexisting nonconforming use".

At the March 10, 1981 hearing the City Attorney acknowledged this fact when he told the City Commission that the application for rezoning was "talking about re-

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Additionally, if the ordinance was to be applied to PROFILES and if this application would have prohibited its intended use, a special exception or variance could have been sought. (59a-69a)

zoning the land for future uses. If there was a vested right for those people to proceed with the wood-chipping operation, it would exist irrespective of the zoning." (70a-72a).

This was a correct statement of Florida law[5].

Therefore, the rezoning from M-1 to B-3-C had no application to PROFILES. More importantly, PROFILES took no action to determine whether the City intended for it to have any applicability, and if so, what that impact might be.

Absent a final decision which was never sought, it cannot be determined that the rezoning ordinance has gone 'too far'.

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5. In *Fortunato v. City of Coral Gables, et al.*, 47 So.2d 321, 322 (Fla. 1950), the Florida Supreme Court held

> Zoning regulations do not generally operate to limit the right of a landowner to continue such uses of land and structures as were in existence at the time of the adoption of the regulations, on the theory that it would be an injustice and unreasonable hardship to compel the immediate removal or suppression of an otherwise lawful business or use already established in the district.

This reasoning has been recently followed in *Lewis v. City of Atlantic Beach*, 467 So.2d 751, 754 (Fla. 1st Dist. Ct. App. 1985):

> The application of zoning regulations to restrict an existing use of property, resulting in substantial diminishment of its value, may constitute a 'taking' by the governmental agency which requires the payment of compensation under well established principles of constitutional law. To avoid these consequences, zoning regulations generally 'grandfather' the continuation of existing nonconforming uses on property subject to zoning classification.

See also Bemas Corp. v. City of Jacksonville, 298 So.2d 467 (Fla. 1st Dist. Ct. App. 1974).

Not only does the Court of Appeals opinion ignore Florida law, but also the opinion creates a direct conflict with the ripeness cases from this Court that have been previously cited.

The opinion also creates a conflict with the Ninth Circuit Court of Appeals opinion in *Shelter Creek Development Corp.*, 838 F.2d at 376-377, which held that a taking claim was not ripe where the landowner failed to seek a determination that an ordinance passed without a legislatively mandated 'grandfather clause' precluded the intended use.

Therefore, the failure of PROFILES to obtain a final decision defeats its federal claim.

E.

Just Compensation

The second prong of the ripeness requirement has been defined by this Court as follows: "[T]he landowner must demonstrate that any proffered compensation is not just." *MacDonald, Sommer & Frates,* 106 S.Ct. at 2566.

As "no constitutional violation occurs until just compensation has been denied," this determination also requires a final determination of "what use, if any, may be made of the affected property". *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 107 S.Ct. 2378 (1987), citing *Williamson County Regional Planning Comm'n,* 105 S.Ct. at 3121, n. 13; *MacDonald, Sommer & Frates,* 106 S.Ct. at 2567.

The Court of Appeals erroneously stated that "[t]he City does not dispute appellant's contention that no state

remedy is available to address the alleged injury . . ." (41a-42a).

This assertion is incorrect. In its answer brief the City took the position that ". . . a property owner must exhaust state procedures for obtaining just compensation, including a resort to state inverse condemnation proceeding, before bringing a 'taking' claim under 42 U.S.C. Section 1983," citing *Anthony v. Franklin County*, 799 F.2d 681, 683-84 (11th Cir. 1986).[6]

More importantly, the determination by the Court of Appeals that Florida law does not provide an inverse condemnation remedy under these circumstances not only misapplies Florida law,[7] but creates a direct conflict with

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6. Page 16 of the answer brief of appellees.

7. The Court of Appeals determined that Florida law does not provide an inverse condemnation remedy for a regulatory "taking" by rezoning, relying on *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987). In *Corn*, the Court of Appeals stated *"it would appear . . .* that because zoning is a function of the police power, monetary damages are not available as just compensation for a taking of property pursuant to the power of eminent domain. at 1517. The Court goes on to observe that the question "[w]hether as a matter of federal constitutional law, Florida would be obligated to permit *Corn* to bring suit seeking recovery of money damages under either a due process or inverse condemnation theory is, at present, *unresolved*". at 1519. (emphasis supplied).

The Court of Appeals then relies on *Dept. of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.*, 521 So.2d 101 (Fla. 1988) as further support for its conclusion in *Corn*. However, the "unresolved question" (the right to money damages in inverse condemnation) which forms the basis for the *Corn* holding had by the time of the *Mid-Florida Growers* decision been resolved by this Court in *First English*. The resolution of this issue has been expressly recognized by the Florida Supreme Court.

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decisions of this Court. In *First English,* this Court put to rest the issue of whether a landowner is entitled to bring an action in inverse condemnation for a regulatory taking pursuant to the fifth amendment to the United States Constitution, regardless of constraints placed on this remedy by state law.

Therefore, the assertion by the Court of Appeals that inverse condemnation is not available is not only incorrect, but is also premature where PROFILES made no attempt to seek compensation.

This failure to seek compensation, absent a direct holding by the state court that there is no inverse condemnation remedy is in direct conflict with the Seventh Circuit opinion in *Unity Ventures v. County of Lake,* 841 F.2d 770, 775-76 (7th Cir. 1988), the Ninth Circuit decisions of *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, amended 830 F.2d 968 (9th Cir. 1981); *Herrington v.*

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As recently stated by the United States Supreme Court, a basic understanding of "the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se,* but rather to secure compensation in the event of an otherwise proper interference amounting to a taking. 521 So.2d at 103, citing *First English,* at 2386.

The Florida Supreme Court has recognized that article X, section 6 (like the Fifth Amendment) is self-executing "it is immaterial that there is no statute specifically authorizing recovery for loss". *Id.* at 103, n. 2. *Cf. Joint Ventures v. Dept. of Transportation,* 519 So.2d 1069, 1071 (Fla. 1st Dist. Ct. App. 1988) ("The Fifth Amendment to the Constitution of the United States and article X, section 6, Florida Constitution, provide that private property shall not be taken for public use without just compensation).

County of Sonoma, 834 F.2d 1488 (9th Cir. 1987); *Shelter Creek Development Corp. v. Oxnard,* 838 F.2d 375 (9th Cir. 1988) and *Austin v. City and County of Honolulu,* 840 F.2d 678 (9th Cir. 1988) and the Eleventh Circuit opinion in *Anthony v. Franklin County,* 799 F.2d 681 (11th Cir. 1986).

As the Ninth Circuit held in *Austin:*

> Until the state courts establish that landowners may not obtain just compensation through an inverse condemnation action under any circumstances [the state] procedures are adequate within the terms of *Williamson County* and [the landowner's] failure to use them cannot be excused at 681.

As both article X, section 6, Florida Constitution (81a) and the Fifth Amendment are self-executing, a statute authorizing inverse condemnation is not necessary to demonstrate adequacy.

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CONCLUSION

Only this Court can insure that federal courts entertain only these challenges to local land use regulation that represent final and authoritative decisions presenting a real case or controversy.

The holding by the Court of Appeals in this case was premature for adjudication as no final decision was ever reached as to whether the rezoning ordinance applied to the property in question and if it did what impact the ordinance had on the use to which the property could be placed.

Finally, the claim was premature as the landowners made no effort to seek or obtain just compensation.

For all these reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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January 17, 1989

APPENDIX

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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

A.A. PROFILES, INC., Plaintiff, vs. CITY OF FORT LAUDERDALE, a MUNICIPAL CORPORATION, E. CLAY SHAW, JR., VIRGINIA S. YOUNG, individually and as Fort Lauderdale City Commissioner, ROBERT O. COX, individually and as Fort Lauderdale City Commissioner, RICHARD A. MILLS, individually and as Fort Lauderdale City Commissioner, BURT FRAZIER, individually and as Fort Lauderdale City Commissioner, and JOHN ALLEN, individually and as Fort Lauderdale City Commissioner, Defendants.	)	COMPLAINT

Plaintiff sues Defendants and states:

1. This action is brought pursuant to and arises under the Fifth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. § 1981, 1983 and 1988 and the common law. The amount in controversy exceeds $10,000.00, all of which more fully appears below.

2. This Court has jurisdiction of this action under 28 U.S.C. § 1331(a), 28 U.S.C. § 1343 and the aforemen-

tioned ststutory constitution provisions. Plaintiff further involved the pendant jurisdiction of this Court to consider claim arising under State Law.

PARTIES

3. Plaintiff, A.A. PROFILES, INC., is a corporation organized and existing under the laws of the state of Florida having its principle place of business in Broward County, Florida.

4. Defendants, CITY OF FORT LAUDERDALE, is a Municipal Corporation organized existing under the laws of the state of Florida.

5. Defendants, VIRGINIA S. YOUNG, ROBERT O. COX, RICHARD A. MILLS, JR., and BURT FRAZIER, at all times material hereto, were duly elected, qualified acting members of Fort Lauderdale City Commission, Defendant City's governing body.

6. Defendant, E. CLAY SHAW, JR., at all times material hereto until midnight on January 2, 1981, was a duly elected qualified and acting member of the Fort Lauderdale City Commission. Specifically, Defendant SHAW was Mayor.

7. Defendant, JOHN ALLEN, was appointed to the City Commission on January 20, 1981, at all times material, since that date was a duly qualified and acting member of the Fort Lauderdale City Commission.

8. The individuals named in paragraphs 5, 6 and 7 and sued individually and in their official capacities.

9. The actions of Defendants forming the basis of this lawsuit were performed under color of state law, to

wit, the constitution and laws of the State of Florida and the charter and ordinances of the City of Fort Lauderdale, as the same, relate to the existance and governments of Municipal Corporations, planning zoning and licensing.

10. The actions of all the Defendants alleged herein were part of an overall course of conduct, carried out in violation of Plaintiff's Federal and State constitutional rights performed as aforesaid under color of state law. The individual acts of Defendants were part of such overall course of conduct and done in furtherance thereof.

FACTS

11. In 1979, Plaintiff became interested in conducting a wood chipping facility in the Fort Lauderdale area. Such an operation involves the conversion of trees, tree branches, shrubs and other plant material—mostly disposed of in land fills—into wood chips, mulch and other products for use in landscaping.

12. Plaintiff selected a site located at N.W. 23rd Ave. and N.W. 19th Street, Fort Lauderdale, Florida, as the location for its proposal project. The legal description of this parcel is attached hereto as Exhibit "A". The land in question had been zoned W-1, the Defendant city's restrictive industrial and manufacturing zoning category, since at least 1948. This parcel was designated "industrial" by both the Broward County Land Use Plan and the Fort Lauderdale Certified Plan. In addition to a variety of heavy industrial uses, property zoned M-1 may be used for auto wrecking yards, salvage yards, junk dealers, etc.

13. Plaintiff sought approval for its plan from the appropriate governmental authorities. The Fort Lauder-

dale Planning and Zoning Board recommended that the City Commissioner approve Plaintiff's plan on November 21, 1979. On December 4, 1979, the City Commission adopted Resolution #79-440 approving Plaintiff's project at which time the wood chipping operation on the property became a legally permitted use of the property involved herein. A copy of Resolution #79-440 is attached hereto as Exhibit "B".

14. Pursuant to Resolution #79-440, Plaintiff applied for and received the required building permits and otherwise complied with all the requirements of Defendant city.

15. In reasonable reliance upon the M-1 zoning, the adoption of Resolution #79-440 and the issuance of the required building permits, Plaintiff proceeded to acquire the land, construct its facility, purchase the machinery necessary for its operation and incur extensive liabilities in connection with the above. By early May, 1980, the same expended and incurred liabilities exceeded $4,000,000.00.

16. The foregoing notwithstanding, at a meeting of the City Commission, Defendant commissioners voted to "temporarily suspend" the approval of the (wood chipping operation) granted by virtue of Resolution #79-440. Pursuant to the purported temporary suspension direction, Plaintiff was ordered to stop all construction or other activity relating to this wood chipping business.

17. At the time Defendants took the action described in paragraph 12 above, each of them knew or in the exercise of research care, should have known:

(a) that neither the city charter nor ordinances of the city of Fort Lauderdale authorized temporar-

ily suspending the approval of Resolution #79-440 and the building permit.

(b) that such recission would deprive Plaintiff of a vested right to use its property in the previously approved manner under the Constitution, statutes and laws of the State of Florida.

(c) that the contemplated change in approval for the wood chipping operation would deprive Plaintiff of property rights secured by the Constitution of the United States having been specifically so advised by Defendant city's own attorney.

(d) that should the permit be suspended and/or resolved, Plaintiff's losses could reasonably be expected to exceed $4,000,000.00.

18. Based on the foregoing, Defendants and each of them knew or should have known that their proposed action was in violation of rights secured by Plaintiff under the Charter and ordinances of the City of Fort Lauderdale, the Constitution and laws of the State of Florida, and the Constitution of the United States. Defendant's actions were therefore illegal, were taken in bad faith and in heedless disregard of Plaintiff's rights.

19. Defendant's course of conduct and threatened enforcement precluded Plaintiff from making use of its property for over nine (9) months, directly and approximately causing damage to Plaintiff as set forth below. After nine months, the City Commission altered the zoning of Plaintiff's property in such a fashion as to permanently preclude the wood chipping operation.

20. As a direct and proximate result of Defendant's disregard of Plaintiff's rights, Plaintiff has been damaged. Plaintiff has been damaged. Plaintiff has losts it's

investment in the property, machinery, and business. Plaintiff has been sued and required to defend itself in various actions. Through Defendant's refusal to permit it to continue with its project, Plaintiff has further lost the profit reasonably anticipated to result from the wood chipping operation. Plaintiff has been required to expend sums in defending litigation and otherwise attempting to mitigate its damages. These sums, exclusive of lost profits, far exceed $4,000,000.00, all of which was reasonably foreseeable.

21. Plaintiff has been required to retain the undersigned counsel and is obligated to pay them a reasonable fee for their services.

COUNT I
(42 U.S.C. 1981 ET. SEQ.)

Plaintiff sues Defendant, CITY OF FORT LAUDERDALE, and says:

22. The foregoing is re-alleged.

23. With expenditure of funds in reliance on the M-1 zoning of the land in questions and Resolution #79-440, Plaintiff acquired a vested right thereunder.

24. Defendant, CITY OF FORT LAUDERDALE, acting under color of state law, did willfully, wrongfully and in bad faith act to deprive Plaintiff of rights guaranteed by the constitution and laws of the United States, in particular those guaranteed by the Fourteenth Amendment "temporarily suspending" Resolution #79-440 for over nine (9) months, threatening to enforce the temporary suspension, and ultimately re-zoning the property.

25. As a direct approximate result of the acts of the Defendant city in temporarily suspending the permit, Plaintiff has been damaged as set forth above. Plaintiff suffered additional loss as a result of the re-zoning.

WHEREFORE, Plaintiff demands judgment against Defendant, CITY OF FORT LAUDERDALE, for damages in excess of $4,000,000.00, together with interest, reasonable attorney's fees and the cost of this action.

COUNT II
(FOURTEENTH AMENDMENT)

Plaintiff sues Defendant, CITY OF FORT LAUDERDALE, and says:

26. The foregoing is re-alleged.

27. The acts and conduct of Defendant, CITY OF FORT LAUDERDALE, herein above alleged, constitute a violation of Plaintiff's constitutional rights secured inter alia by the Fourteenth Amendment to the Constitution of the United States and establishes as a cause of action pursuant to 28 U.S.C. § 1331.

WHEREFORE, Plaintiff demands judgment against Defendant, CITY OF FORT LAUDERDALE, for damages in excess of $4,000,000.00, together with interest, attorney's fees, and the costs of this action.

COUNT III
(TITLE 42 U.S.C. 1981, ET. SEQ)

Plaintiff sues Defendant Commissioners and states:

28. The actions of Defendants, SHAW, YOUNG, COX, MILLS AND FRAZIER, in acting to temporarily

suspend the Resolution and building permits were taken with full knowledge that Plaintiff's rights under Resolution #79-440 and the applicable zoning vested and their actions would violate Plaintiff's rights under State law and Federal Constitution.

29. The foregoing notwithstanding the aforesaid Defendants acted temporarily suspending the Resolution and ultimately Plaintiff permits. Those actions were willful, intentional, and done with full knowledge of and heedless disregard of Plaintiff's constitutional rights and, presumably, performed to further Defendant's own individual interests. The acts of the Defendants contained in paragraph 28 above were therefore done in bad faith and with actual malice as to Plaintiff.

30. Furthermore, the acts of Defendant Commissioners constitute a suspension of the building permit, a function which, under the city charter, ordinances and general law, is a function of the building inspector. That function is administrative in nature and by electing to perform such acts Defendant Commissioners were acting in an administrative capacity.

31. Defendant, ALLEN, upon his appointment, performed acts and furtherance of the overall design described above thereby ratifying and affirming the acts of the other Defendant Commissioners. Subsequently, Defendant Commissioners, including Defendant ALLEN, excluding Defendant SHAW, voted to and in fact did change the zoning of Plaintiff's property so as to permanently exclude the use to which Plaintiff's rights had vested.

32. As a direct approximate result of the acts of the Defendant Commissioners, Plaintiff has been damaged as aforesaid.

WHEREFORE, Plaintiff demands judgment against Defendants E. CLAY SHAW, JR., VIRGINIA YOUNG, ROBERT O. COX, RICHARD A. MILLS, JR., BURT FRAZIER, and JOHN ALLEN for compensatory damages in excess of $4,000,000.00, punitive damages, reasonable attorney's fees, interest, and the cost of this action.

COUNT IV
(FOURTEENTH AMENDMENT)

Plaintiff sues Defendant Commissioners and states:

33. The foregoing is re-alleged.

34. The acts and conduct of Defendant Commissioners constitute a violation of Plaintiff's constitutional rights secured, inter alia, by the Fifth and Fourteenth Amendment to the Constitution of the United States and establish a cause of action pursuant to 28 U.S.C. 1331.

WHEREFORE, Plaintiff demands judgment against Defendants, E. CLAY SHAW, JR., VIRGINIA YOUNG, ROBERT O. COX, RICHARD A. MILLS, JR., BURT FRAZIER, and JOHN ALLEN, for compensatory damages in excess of $4,000,000.00, punitive damages, reasonable attorney's fees, interest, and the cost of this action.

COUNT V
(UNLAWFUL TAKING)

Plaintiff sues Defendant CITY OF FORT LAUDERDALE, and states:

35. The foregoing is re-alleged.

36. The acts of Defendant City were unlawful and unconstitutional taking of Plaintiff's property, in viola-

tion of Plaintiff's rights under the Fifth and Fourteenth Amendments as the same guarantee freedom from such taking of private property without just compensation. Plaintiff has not been compensated for such taking.

37. The fair market value of the property taken exceeds $10,000.00.

WHEREOF, Plaintiff demands judgment against Defendant City for the fair market value of the property taken in accordance with Florida Statutes and the United States Constitution together with incidental and consequential damages as are recoverable pursuant to law.

COUNT VI
(BREACH OF CONTRACT)

Plaintiff sues Defendant city and states:

38. The foregoing is re-alleged.

39. This is an action for Breach of Contract.

40. Defendant CITY OF FORT LAUDERDALE undertook a contractual relationship with Plaintiff, pursuant to which Deefendant agreed to permit Plaintiff to conduct a wood chipping operation on the property involved herein in consideration of Plaintiff's obtaining certain permits from Broward County, making certain design changes in its facilities, transferring to Defendant a portion of the property as a right of way, and paying all applicable permit fees.

41. Plaintiff performed all its obligations under the agreement. All other conditions precedent to the obligations of Defendant to Plaintiff have occurred.

42. In reasonable and detrimental reliance on Defendant's promise, Plaintiff expended funds and incurred obligations in excess of $4,000,000.00.

43. The foregoing notwithstanding Defendant, as set forth above, failed and refused to honor obligations to Plaintiff thereby breaching its contract.

44. As a direct and approximate result of Defendant's Breach, Plaintiff has been damaged as set forth above.

WHEREFORE, Plaintiff demands judgment against the Defendant, CITY OF FORT LAUDERDALE, for damages in excess of $4,000,000.00 together with interest, and the cost of this action.

COUNT VII
(NEGLIGENCE)

Plaintiff sues all Defendants and says:

45. The foregoing is re-alleged.

46. As a direct result of the matters set forth above and in particular the enactment of Resolution #79-440 Defendants and each of them undertook a duty to Plaintiff of exercising due care in their dealings with Plaintiff different from that owed to the community at large. That duty was individually and solely owed to Plaintiff in that it is the named party on Resolution 94-440.

47. The duty thus assumed included, but was not limited to, the exercise of due care in dealing with Plaintiff's vested rights in accordance with the laws of the State of Florida and the United States.

48. Defendant's and each of them, breached the duty owed to Plaintiff in suspending the Resolution and alter-

ing the zoning, failing to utilize the due care owed to Plaintiff in determining Plaintiff's rights. Furthermore, the actions alleged above were performed willfully, deliberately and in the case of Defendant City, Defendants SHAW, COX, MILLS and FRAZIER, with actual knowledge that these acts contravened Defendant's right and would result in severe damage to Plaintiff. Defendant ALLEN either knew or in the exercise of reasonable care should have known of the foregoing. The acts of Defendants were therefore performed with heedless disregard of Plaintiff's rights and thus maliciously.

49. Plaintiff has been damaged as a direct and approximate result of such acts as set forth above.

WHEREFORE Plaintiff demands judgment against Defendants for damages in excess of $4,000,000.00 together with punitive damages, interest, and the cost of this action.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 81-6424-Civ-NCR

A. A. Profiles, Inc.,)
)
vs)
)
City of Fort Lauderdale, et al.,)
)
)

Volume III

• • •

(p. 318) THE COURT: The matter is before me now on a motion under Rule 41 at the close of the Plaintiff's case.

Statement of facts of the pretrial stipulation were introduced in the record and incorporated herein.

This matter resulted in the Plaintiff purchasing 38 acres of land lying just west of Interstate 95 in Fort Lauderdale, surrounded on the west by a residential area, and northwest Fort Lauderdale area, in what is essentially an all-black neighborhood. It was zoned M-1 and had been for many years. Plaintiff wanted to erect a wood-chipping plant on the site. That use was permitted under the zoning classification, approved by the Planning and Zoning Board with an understanding that a ten-foot wall was going to be erected around the site which would (p. 319) essentially be over a mile long. Building permit for the

wood chipper was issued early 1980 and it was approved by the City Commission. I don't have the dates on that. I don't believe it's critical at this point.

Then in April, Plaintiff went to the building inspector, and asked if it would be all right if they could receive trees and branches, the raw material involved in a wood chipping operation, which is simply the reception of land developers' trees, branches, shrubs, grasses, et cetera, and then these matters would be processed into little wood chips by this machine and sold as ground cover, used by landscape architects, gardeners. Also creates a mulch and similarly sold. The inspector saw no reason he could not receive the material, Calvin Howe, whom he asked, as long as the chipper wasn't in operation.

Much of this 38 acres, by the way, was to be used for this reception of storage material, so that there would be a steady flow apparently of wood to be processed.

Mr. Hogan, who was President and owner, alter-ego of Plaintiff corporation, asked Mr. Howe "What if somebody complained?" and Mr. Howe indicated it would have to stop the operation. That occurred (p. 320) apparently in late April, and then about that time material was received.

Unfortunately, the Plaintiff had put up signs that said "Le Dump" on the property and indicated in the brochure that they were open. And the brochure was circulated and the brochure referred to it as "Le Dump." That caused a bit of inquiry by the adjoining neighborhood and they, homeowners, came to look at the property and then they protested to City Hall. A meeting was held on the

6th of May. The Result of the meeting on the 6th of May, there were indications of threats of violence by residents in the neighborhood. Property was red-tagged by the Building Department, and that brought construction to a halt. Eventually, the property was rezoned the following year; zoned upward where it was not as flexible and would not accommodate anything like a wood chipping operation. And this lawsuit resulted.

Defendant raises in its motion a number of grounds: There was no taking; Plaintiff hasn't shown any deprivation of substantive due process or procedural due process; that there's legislative immunity on behalf of the City and also a failure of proof as to causation, insufficient evidence. Let me take these matters one by one.

(p. 321) On the taking matter, I admit some difficulty in reconciling two cases that are binding upon me; namely Rymer versus Douglas County from the Eleventh Circuit in 1985 and Wheeler versus the City of Pleasant Grove, Unit B, 1981. It's not quite as serious as Judge Learned Hand's marvelous description of difficulty in applying the Supreme Court's rules on what constitutes jurisdiction of non-resident Defendants when he referred to it as We must leap from tuft to tuft across the morass. That may be a little strong for this situation. There may be some way to reconcile these cases. Aspects of both of them that are very similar to this case. In Wheeler versus City of Pleasant Grove, Plaintiffs got a legitimate permit under the zoning to build apartments and a huge uproar developed in the community and a referendum was held. I wonder what kind of referendum was held. Case doesn't elaborate. Great opposition to the apartments. And the

City then passed an ordinance which curtailed the construction of the apartment buildings. And the Fifth Circuit panel pursuant or per the opinion of Judge Clark described the enactment of the ordinance to be a bald attempt to revoke an already authorized building permit, this action was a confiscatory measure, therefore if a regulatory undertaking is (p. 322) confiscatory in nature, it is a taking, and affirmed the liability. In Rymer, the Eleventh Circuit in 1985 dealt with a very appealing case of two people who had been issued a building permit for their home, single family home in a subdivision, and simply was not sanitary because the water table was so high it wouldn't support a spetic tank system, and the State wouldn't let them build a sand treatment system, and they tried to lower the water table, and that didn't work, and so the State then cited them for health reasons. In the Eleventh Circuit decided it was not a taking, noted that the County did not attempt to acquire the Rymer's property, did not attempt to acquire the beneficial use of the property at all.

In some ways, that homeowner's plight is an extremely sympathetic matter, and stronger than the Plaintiff's position here. In other ways, Plaintiff's position here is very much like the permit holder in, both legitimate permit holders, in Wheeler versus Pleasant Grove. Even more difficult for the fact there is one judge common to both panels, and Wheeler is not mentioned in the opinion in Rymer. Alas, that's the situation. Because of other matters, I'm going to get to in a moment, appears to me that Rymer is closer in the situation, and let me explain why. Many of the facts (p. 323) of this case are very beautifully chronicled. A letter dated November 26, 1980 on

Profiles stationery to their friendly Landmark banker, Mr. Pribil, Defendant's Exhibit 66—and I want to compliment Counsel on the way these exhibits have been marshaled and presented. Now Mr. Hogan denies he ever saw that letter before the day of trial; that his executive secretary always provided him with his information. And this was a big economic enterprise at this time. Mr. Hogan's denial is remarkable at best. Totally lacking in credulity considering the way this project was going. I should say credibility. I find the lack of credulity on my part as to that testimony. Anyway, let me summarize from the exhibit:

We halfway opened for business on Monday, April 14th. That ties in with other evidence in the case. And then last Friday, and he said April 19th,—Friday would have been the 18th; I presume it happened on a Friday—five of the black neighbors of the area showed up and wanted to know what was going on, what this project was going to be, and they were shown by the manager Don Lewis. They appeared shocked by the fact that the City would permit such an operation. They indicated they were going to sue the City about this matter.

(p. 324) On Monday, April 21st, twelve automobiles, some 20 blacks pulled in the driveway. The head man, a graying black named William Dandy, who's apparently on the School Board and served five years on the Planning Board for the City of Fort Lauderdale, was the instigator of the entire group complaining, and he informed the manager he would "shut you down" and he indicated he was headed for City Hall and that they would be back.

Tuesday they all appeared again along with the press and the Assistant City Manager Jim Hill, who incidentally

for the record is black, acknowledged in this letter, and he is described in the letter as very nice and on our side. He then came out and "caught hell from the mob of blacks, particularly Dandy."

And then the letter continues and I'm quoting, "The main thrust of the complaint was the name Le Dump, indicating that we would take anything," And he points out the previous day some of the material they had received was a grapefruit tree full of grapefruit. That delighted everybody. They helped themselves to the grapefruit. And the letter continues: We do not permit anything that does not grow to be dumped, though some trash gets in each load and then we have to pay for a truck to haul it away, and the dump truck left an hour before. He says that along about 4:30 P.M. (p. 325) on Tuesday, which would have been the 23rd—22nd, the City-red-tagged it, and that red tag was lifted a few days later because there was some failure in the condition precedent about the paper work for the widening of the streets. And acknowledges, this is on the 26th, that the City [and our Council] have advised us we better close operations of any sort until the wall is completed. Of course that had been the understanding at the time they appeared before the Planning and Zoning when the permit was issued. Then there's disparaging of the neighborhood and angry about lawyer's fees and so forth. They had complained that they do not take garbage. And it was prepared for Hogan's signature and typed by his executive secretary, who advised him every day of pertinent matters.

On the 6th, at the meeting, City Commission meeting, this is a transcript, there are very veiled but rather unmis-

takably clear expressions of potential violence and riots in the neighborhood if the matter is not stopped. And as I recall the City Commission, the Commissioners' reaction, they were concerned about the operation being a dump and that was not what they anticipated when the wood chipping was first approved and when this permission was given.

(p. 326) Now on the 7th, the City red tags it and I believe that was after the residents in the neighborhood had formed a human chain across the roadway, halted all construction of the wall or anything else. And at that point, things just sort of stop on the part of the Defendants, and they went on until July 1st, there was a meeting, and another meeting on July 3rd. There were some comments prepared by the Plaintiff on July 2nd, which are instructive. They acknowledged that they should have waited before taking the trees into the property until the wall was completed. Conclusion is what's really instructive: "At this writing, July 2, 1980, the very worst thing that could happen to us would be for the City to return our permit. We have no funds and are unable to do a thing. Riteco, or Landmark, could foreclose any minute." Those were the first mortgagee and Landmark Bank the second mortgagee. Gave a mortgage back to Riteco, the seller.

I think it was the first July meeting of the City Commission there were threats of violence and riots rather strongly expressed in behalf of the black community by Reverend Collier, as well as Mr. Dandy. Mr. Dandy is a little smoother in his description and he is fairly clear-cut anyway. And the matter had (p. 327) stopped and

was red-tagged and went on to the following year before it was zoned in a more restrictive manner. And then the following year, Riteco foreclosed after the bank had expended some money trying to protect its position.

Let me further add in here, I think I have gone about this in the wrong way of trying to make it kind of a cohesive chronological statement from the bench of findings and conclusions. I am going to have to leap from tuft to tuft across my morass of findings, I'm afraid. But it strikes me if there is a distinction one can draw between Pleasant Grove and Rymer, it is that this is a proper exercise of police power on the part of the City in this situation because of the obvious danger in the results from riots; and the threatened riots weren't really considered an idle threat at this point in time, May of 1980, early May of 1980, because I take judicial notice of that. I can tell you why. Because judges from Miami, when they flew to the Circuit Conference in Dallas, we see Overtown burning in Miami. That was right after the trial of the people charged with beating McDuffie to death on the Interstate in Miami. Had provoked a huge outrage in the community, outcry, and obviously more than an outcry. All types of violence. That was the background historically which is (p. 328) occurring at that point in time. So as much as we try to disassociate ourselves here in Fort Lauderdale with what happens in Miami, it's kind of like having an idiot kid in the family—you can't ignore him and you're tied to him, whether you want to or not. And the same think can very quickly spread, and no one wanted that in Fort Lauderdale. Certainly no one on the City Commission did not. So they are exercising police power in tem-

porarily suspending the building permit. And I'm very sorry now I didn't start off with a chronological presentation of these findings.

Throughout this matter, up until this uproar at the end of April, 1980, the City had done everything in a nice-smooth fashion in this, and at the end of April, the Plaintiffs were commenting that Jim Hill, at considerable risk to his own reputation in the community, is taking the Plaintiffs' part out there, the site. As this point, the City wants to, and that's shown very clearly by the comments of Commissioner Cox, among others, at the May 6th meeting, and wants to see what's going on, that they don't want a dump there. So the suspension of the building permit was made temporary at that time. The difficulty in the case is that it in effect became permanent and that there was no lifting of the suspension and eventually, a year (p. 329) later or so, the matter was rezoned and of course by then the property had been foreclosed. Under those circumstances, it seems most reasonable to me that the City would exercise its discretion in the exercise of police power to do exactly what it did. It did not want any kind of a riot situation on this land. Strikes me that under no circumstances does the conduct of the City Commissioners or the City administrative officials has been shown to be sufficiently egregious as to be constitutionally tortious. I just don't find that in this in any way, shape or form.

Consequently, I don't find a taking here. Although it's not perhaps said so in so many words, substantive due process of this area is about almost coterminous and congruent with the outlines of the taking. I don't find denial of substantive due process. Procedural due process,

Plaintiff hangs their hat on very strongly, and I think that's one of the weakest of the positions. Rather clearly, the South Florida Building Code, matter of great moment to us here in South Florida because of our exposure to hurricanes, is applicable by special State Act in 1971. It is particularly applicable to Broward County, Act of 71-575. And the stop-work orders can be issued when there is violation of the Code and there is an appellate (p. 330) procedure set forth; results in disposition by the State Circuit Court. Plaintiffs in this case availed themselves of no State remedies made no effort to do so, even though the procedure is available, and I think we can readily tell why. Last thing in the world Plaintiff wanted was for the City to lift the suspension. They couldn't have handled it. Plaintiff was moribund financially and rather obvious from the exhibits, it was moribund in March. The letter dated March 12, 1980, signed by Mr. Prugh of Profiles, Plaintiff, discusses the financial plight rather candidly with their friendly banker, Mr. Pribil. This is under Exhibit 66. He is setting forth the various difficulties they have, and asking for an interest-only period from the bank. And the other difficulty is, they weren't living up to, and it's all tied up, they were not—they, Profiles, were not living up to their agreement to build the wall. And Mr. Hogan's own testimony on cross-examination was that the wall was "absolutely" a part of the approval and it was "a major part of our presentation to the City". The wall wasn't done. They were only to the footers. Unfortunately there is no evidence in the record about how long it would take to build a ten-foot high concrete wall that had to have offsets, stuccoed on the exterior, how long (p. 331) it would take to build that when it's over a mile

long. The chipper could not be put in operation until the wall was erected.

So between the time, the eight-week period between May the 7th and July 2nd, if they had gotten a wall done, everything points to the fact that still the worst thing the City could have done would have been to say Right on. You can start up whenever you get the wall built.

Plaintiff did not sue in State Court and take advantage of its remedies provided there because, I'm convinced, always contemplated the only remedy for the moribund corporation at that time was a successful suit in Federal Court. That's what was filed.

Last matter I get to, I should have taken up first. That is the insufficiency of the evidence. I've touched on a number of the matters here and so that I just simply incorporate them all again, with one added provision, and that is the causation factor, use of the word "Le Dump." November of '79 Mr. Hogan is describing matters at the tree disposal ward in his correspondence with Mr. Pribil. On March 7th, correspondence to Mr. Pribil refers to Le Dump land. It continued on. Two letters on March 7th, one that just refers to it as Le Dump: "We got some excellent bids in today for Le Dump. (p. 332) I am enclosing a copy of them for your files." The boss is talking about Le Dump. It's not surprising that someone in the corporation then erects signs in April on the property that says Le Dump. And that subsequently in April a brochure is circulated, of course to the developers, because that's the people they expected to get the wood from, but also it got out in the neighborhood, and that refers to Le Dump. Just referred to constantly: "March 10th, March

12th, March 24th. Nearly every letter at that point in time has Le Dump. Occasionally just "the dump."

On March 31st, Mr. Hogan, the letter he denies knowing anything about, and it starts off, "Am having Dee Dee type and mail this to you as I have to make a trip and may not be back for a few days, and wanted to report to you on Le Dump progress last week." And of course, I asked Mr. Hogan who Dee Dee was, and that was the secretary of the corporation of A. A. Profiles. It's on one of these exhibits and it's her initials on the, her initials are on this letter, and a number of other letters, such as the April 26th one. April 7th letter, Le Dump. Le Dump is just the way it's referred to in-house, and outside to the public.

I say these findings are necessary on causation because this matter was just going swimmingly, (p. 333) albeit underfinanced and undercapitalized until Plaintiff antagonizes the community by putting up a sign that indicates that next door to all these people's homes a dump is going to be operated. I can't imagine anything that's closer to economic suicide than that kind of public relations. I mean you don't get that kind of reaction is you put a dog pound or a tanning factory or prison next to a subdivision, I wouldn't think anyway. In any event, even then the City was trying to save Profiles' bacon; what I previously referred to as Jim Hill's effort to defuse the situation with the neighborhood. And even in the May 6th meeting, the City is still trying to save Profiles' bacon, because they wanted to look into it. And as Commissioner Cox expressed it "I didn't vote for a dump," and he wanted—he expressed very celarly that he wanted to follow the law: "I wanted to find out whether or not this

was a dump." That attitude on the part of the Commissioner may not have been expressed as well by the others. It's rather apparent by their attitude, and justifiably, because their City Attorney was advising them that the permit had been legally obtained. The problem was it was legally obtained at the time, but two things ruined the whole deal. One, Profiles did not erect the wall first, because they were financially strapped; second, (p. 334) they wanted to operate in order to have the cash flow to do it. Maybe understandable but it's one of the causation factors here. The other one is Plaintiff's use of the word "Le Dump."

Therefore, I grant the Defendant's Rule 41 motion, dismiss the case with prejudice on all the bases: There was no taking; there is no denial of substantive due process; there is no denial of procedural due process; the Plaintiffs have not availed themselves of the State remedies; and there is no sufficiently egregious conduct to be constitutionally tortious on the part of the Defendants; and the Plaintiffs' evidence is insufficient, that it founders on a lack of causation. And they did it to themselves perhaps more dramatically than any case I remember in a long time. I did not add some other matters there that could be thrown in.

The news media predictably failed today with their—as is complained about in the April 26th letter, and it did not get any better.

I have not dotted all i's, crossed all the t's, for example, about the zoning being changed later on, about what date and all that, or the foreclosure and what date, because to me it all boils down pretty much to what happened be-

tween March, April, May, June (p. 335) and July. By July, Plaintiff, but for the Plaintiff's financial inability and the fact that they had created the problems themselves, with the failure to build the wall and the use of the phrase Le Dump, they would have had their operation going. They did it to themselves. There's no way that the City and the taxpayers and Commissioners have shown to be liable for that nor should they have to respond in damages for it. Judgment for Defendants.

Court is in recess.

One more matter. I shall not enter these findings and conclusions if anybody feels that these are incomplete or should be supplemented or augmented or corrected in any way. Either side may file a motion in that regard. I will try to do it in sufficient detail, although I wish I had gone to the facts first. And if you want to make such a motion—I tried to do them in such detail for the benefit of any review if that happens.

If you want it reviewed in any way, or if you take an appeal, you are ordered by this Court to provide me with a copy of the transcript and submit any proposed findings in that regard so that I may make whatever modifications that I think may be necessary.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-6424-CIV-ROETTGER

A. A. PROFILES, INC.,
Plaintiff,

v.

CITY OF FORT LAUDERDALE,
etc., et. al.,
Defendants,

_____/

ORDER OF DISMISSAL
(Filed December 30, 1986)

THIS CAUSE is before the court on motion of defendant, CITY OF FORT LAUDERDALE, for an involuntary dismissal pursuant to Rule 41 of the Federal Rules of Civil Procedure. The court having considered the evidence presented by plaintiff in this cause and determined that upon the facts and the law the plaintiff has shown no right to relief, it is

ORDERED AND ADJUDGED that defendants' motion is GRANTED and the case is hereby DISMISSED with prejudice.

FURTHER ORDERED that the parties are granted leave to file motions to correct or supplement the findings of fact and conclusions of law that were announced in open court.

DONE AND ORDERED this 29 day of Dec, 1986.

/s/ Norman C. Roettger, Jr.
NORMAN C. ROETTGER, JR.
DISTRICT COURT JUDGE

cc: counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-6424 Civ NCR "J" Roettger

A.A. PROFILES, INC.,

Plaintiff,

v.

CITY OF FORT LAUDERDALE,
etc., et al.,

Defendants.

_____/

PLAINTIFF'S MOTION TO ENLARGE TIME FOR APPEAL, REQUEST FOR EXPEDITED CONSIDERATION OF THIS MOTION AND MEMORANDUM OF LAW

(Filed January 26, 1987)

Plaintiff, A.A. PROFILES, INC., pursuant to Rule 4, *F.R. App.P.* moves this court enlarge the time for filing an appeal from the final judgment previously entered in this case and to consider this request on an expedited basis on the following grounds:

1. On December 29, 1986, Defendant filed an Motion for New Trial or Reconsideration, Defendants filed a request for supplemental findings and conclusions, and the Court signed a written order dismissing this case with prejudice. That order of dismissal was docketed the following day. On January 8, 1987, within ten days from the date of that order, Plaintiff filed proposed findings and conclusions. The previous day, this court denied the

motion for New Trial or Reconsideration. Both requests for proposed findings remain pending.

2. Both a motion for new trial and a request for findings toll the time for filing an appeal. Rule 4 (a)(4) *F.R. App.P.* which, thereafter, commences to run with the denial of any such motion. The purpose of the rule is to allow the district court to complete its work prior to the commencement of appellate review without allowing rehearings of rehearings.

3. In this case, the Court has denied one of three timely motions tolling the appeal period which, if calculated from the denial of that motion, expires February 6, 1987. In order to allow time for for consideration of all matters and the filing of one notice of appeal, Plaintiff respectfully requests this Court extend the time for filing an appeal for a period of thirty (30) days after the court has issued its written findings and conclusions.

4. Rule 4(a)(4) allows this court to grant such extentions and consider the same on as ex parte basis.

WHEREFORE, Plaintiff moves this Court enlarge the time for filing an appeal.

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail to Robert Schwartz, Esq, P.O. Box 14608, Fort Lauderdale, Florida, this 27th day of January, 1987.

/s/ Philip Michael Cullen, III
PHILIP MICHAEL CULLEN, III
Chartered
621 South Federal Highway
Suite Four
Fort Lauderdale, Florida 33301
(305) 462-0600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-6424-CIV-ROETTGER

A. A. PROFILES, INC.,

Plaintiff,

v.

CITY OF FORT LAUDERDALE, et al.,

Defendants,

_____/

(Filed January 8, 1987)

THIS CAUSE is before the court on motion of plaintiff, A.A. PROFILES, INC., for a rehearing or for reconsideration of the ruling of this court in the above-captioned case. Upon consideration of the motion and the record in this action, it is

ORDERED AND ADJUDGED that Plaintiff's motion is DENIED.

DONE AND ORDERED this 7 day of January, 1987.

/s/ Norman C. Roettger, Jr.
NORMAN C. ROETTGER, JR.
DISTRICT COURT JUDGE

cc: counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-6424 Civ Roettger

A. A. PROFILES, INC.,

Plaintiff,

v.

CITY OF FORT LAUDERDALE,
etc., et. al.,

Defendants,

_____/

NOTICE OF APPEAL TO A COURT OF APPEALS
FROM A JUDGMENT OR ORDER OF A
DISTRICT COURT

(Filed February 6, 1987)

Notice is hereby given that A.A. PROFILES, Plaintiff herein, appeals to the United States Court of Appeals for the Eleventh Circuit from the final order of dismissal entered in this case on December 30, 1986, rehearing denied by order entered January 8, 1987.

Dated: February 6, 1987.

/s/ PHILIP MICHAEL CULLEN, III
Philip Michael Cullen, III
Chartered
621 South Federal Highway
Suite Four
Fort Lauderdale, Florida 33301
(305) 462-0600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-6424-CIV-ROETTGER

A. A. PROFILES, INC.,

Plaintiff,

v.

CITY OF FORT LAUDERDALE,
etc., et. al.,

Defendants,

_____/

(Filed March 5, 1987)

THIS CAUSE is before the court on motion of plaintiff, A.A. PROFILES, INC., for an extension of time to file an appeal from the final judgment entered in this case. Upon consideration of the motion and the record in this action, it is

ORDERED AND ADJUDGED that plaintiff's motion for extension of time is DENIED.

FURTHER ORDERED that the request for findings filed by plaintiff is DENIED [NCR] as advised by the court in open court, [NCR] the parties may obtain written findings simply by obtaining transcripts of the findings issued from the bench.

DONE AND ORDERED this 5 day of March, 1987.

/s/ Norman C. Roettger, Jr.
NORMAN C. ROETTGER, JR.
DISTRICT COURT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-CIV-ROETTGER
81-6424-CIV-NCR

A. A. PROFILES, INC.,

Plaintiff,

v.

CITY OF FORT LAUDERDALE,
etc., et. al.,

Defendants,

_____/

NOTICE OF APPEAL

(Filed March 17, 1987)

NOTICE IS HEREBY GIVEN that A. A. Profiles, Plaintiff herein, appeals to the United States Court of Appeals for the Eleventh Circuit from the final order of dismissal entered in this case on December 30, 1986, rehearing denied by order entered January 8, 1987, Motion For Supplemental Findings and Conclusions denied March 5, 1987.

This Notice of Appeal is filed pursuant to Rule 4(a)(4) *F.A.App.P.*

The filing fee was paid with the original Notice of Appeal filed February 6, 1987.

Dated: March 16, 1987.

/s/ PHILIP MICHAEL CULLEN, III
PHILIP MICHAEL CULLEN, III
Chartered
621 South Federal Highway
Suite Four
Fort Lauderdale, Florida 33301
(305) 462-0600

A.A. PROFILES, INC.,

Plaintiff-Appellant,

v.

CITY OF FT. LAUDERDALE, et al.,

Defendants-Appellees.

No. 87-5219.

United States Court of Appeals,
Eleventh Circuit.

Aug. 1, 1988.

Landowner brought civil rights action against city and members of city commission seeking relief for taking of property without just compensation. The United States District Court for the Southern District of Florida, No. 81-6424-CIV-NCR, Norman C. Roettger, Jr., J., granted city's motion to dismiss, and landowner appealed. The Court of Appeals, Vance, Circuit Judge, held that city's adoption of ordinance which rezoned property of landowner who wished to develop wood-chipping operation to classification which did not accommodate such development was an unconstitutional taking.

Reversed and remanded.

Philip M. Cullen, III, Ft. Lauderdale, Fla., for plaintiff-appellant.

Robert H. Schwartz, Ft. Lauderdale, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and VANCE, Circuit Judges, and HOFFMAN*, Senior District Judge.

VANCE, Circuit Judge:

A.A. Profiles, Inc. filed suit against the City of Fort Lauderdale and the members of the City Commission, individually and in their official capacity (collectively "the City"), seeking relief under 42 U.S.C. § 1983[1] for the taking of property without just compensation in violation of the fifth amendment and the deprivation of property without due process in violation of the fourteenth amendment. The case proceeded to a non-jury trial on the issue of liability only. At the conclusion of the plaintiff's case the district court granted a motion for dismissal under Fed. R.Civ.P. 41(b). The district court found no taking and no denial of substantive or procedural due process because appellant did not avail itself of state remedies. We reverse the district court's judgment and remand.

I.

In 1979 appellant contracted to purchase a twenty-eight acre tract of land in the northwest section of Fort Lauderdale, Florida. The land was zoned M-1, the city's least restrictive industrial and manufacturing classification. Because appellant planned to operate a wood-chipping business on the site, the sales contract was con-

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* Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

1. The complaint also sought relief under sections 1981 and 1988, and various common law theories. The section 1981 claim was not pursued.

ditioned on the City's approval of the proposed development.

As its first step in the approval process, appellant submitted its proposal to the City's Planning and Zoning Department. The proposal was reviewed and approved initially by several city and county agencies. The proposal submitted to the Planning and Zoning Department provided that a ten foot concrete wall would be built around the entire site. After a public hearing, the Planning and Zoning Department voted to recommend that the City Commission approve the development. The City Commission held a public hearing on December 4, 1979 and unanimously passed Resolution No. 79-440 approving the wood-chipping development planned by appellant.

Having obtained the necessary approvals, appellant completed the purchase of the land, obtained building permits and commenced construction on the land. Thereafter appellant asked the City's Chief Building Inspector if it could begin receiving organic materials in order to relieve some cash flow problems. Although the wall was not completed, the Inspector approved this activity, but warned appellant that if there were any complaints the activity would have to cease. Advertising the development as "Le Dump," appellant began to receive and store materials.

The city began receiving complaints from area residents and on April 22, 1980 the Chief Zoning Inspector ordered the project stopped on the grounds that the plans used for permitting purposes were not the same as the plans approved by the Planning and Zoning Board and the City Commission. At the same time the city man-

ager ordered appellant to cease operations after an inspection had revealed that appellant was operating an illegal dump. Due to the new developments the City Commission held a public hearing on May 6, 1980 to address the growing concerns. At the meeting the City Commission voted to "temporarily suspend" the approval of the development granted by Resolution No. 79-440. The next day a "stop work" order was posted on the project by the Director of Building and Zoning.

At a subsequent hearing on July 1, 1980 the City Commission again addressed the wood-chipping operation and asked the city attorney to draft a resolution to modify the original resolution. The proposed resolution was submitted to the City Commission at a public hearing on July 30, 1980.[2] Once again numerous residents voiced their opposition to the project and hinted that violence might ensue if the City Commission permitted the project to proceed. The discussion ended shortly after appellant announced that it would not proceed with the project until it clarified its legal position with the City.

Although open to reasonable alternatives appellant subsequently requested the City to "cease its attempts to make the continuance of this project unfeasible" and demanded damages for losses. On March 10, 1981 the City Commission unanimously passed Ordinance No. C-81-16 rezoning the site from M-1 to B-3-C, light industrial use.

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2. The proposed resolution required that a buffer zone be established along all sides of the property and that the wall be built before the commencement of operations. In addition, the proposal required that the wood-chipping machine be operational prior to the acceptance of materials.

Ultimately, appellant became unable to meet expenses and the lenders foreclosed on the appellant's property.

II.

In order to prevail in an action under 42 U.S.C. § 1983, a plaintiff must show a constitutional violation. *See Rymer v. Douglas County,* 764 F.2d 796, 800 (11th Cir. 1985). Appellants in this case allege that the City's actions violated the constitutional prohibition against taking private property without just compensation and the constitutional requirement of procedural due process.

The fifth amendment provides that "private property [shall not] be taken for public use, without just compensation." The fifth amendment applies to the states through the fourteenth amendment. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* — U.S. —, 107 S.Ct. 2378, 2383 n. 4, 96 L.Ed.2d 250 (1987); *Chicago, B. & Q.R. Co. v. City of Chicago,* 166 U.S. 226, 241, 17 S.Ct. 581, 586, 41 L.Ed. 979 (1897); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.,* 678 F.2d 1038, 1040 n. 4 (11th Cir.1982). This amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church,* 107 S.Ct. at 2385; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 297 n. 40, 101 S.Ct. 2352, 2371 n. 40, 69 L.Ed.2d 1 (1981).

The Supreme Court has recognized that a taking may occur where a governmental entity exercises its power of eminent domain through formal condemnation proceedings, *see, e.g., Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98,

99 L.Ed. 27 (1954), or where a governmental entity exercises its police power through regulation which restricts the use of property. *See Nollan v. California Coastal Comm'n,* — U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Kaiser Aetna v. United States,* 444 U.S. 164, 178, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). In the latter situation the government regulation must "substantially advance" a "legitimate state interest" or deprive an owner of an economically viable use of the land. *Keystone Bituminous Coal Ass'n v. DeBenedictis,* — U.S. —, 107 S.Ct. 1232, 1242, 94 L.Ed.2d 472 (1987); *Nollan,* 107 S.Ct. at 3146; *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). "[I]f regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Co.,* 260 U.S. at 415, 43 S.Ct. at 160.

On numerous occasions the Supreme Court has noted that a takings claim based on the application of a governmental regulation "is not ripe [for adjudication] until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 3117, 87 L.Ed.2d 126 (1985); *see MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986); *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981); *Agins,* 447 U.S. at 260, 100 S.Ct. at 2141; *Anthony v. Franklin County,* 799 F.2d 681, 683-84 (11th Cir.1986). This finality requirement is necessary so that the court can evaluate

the "economic impact" and the extent of interference with "reasonable investment-backed expectations" by the challenged state action. *Williamson County,* 105 S.Ct. at 3119. A plaintiff also must establish that "no adequate state remedy, such as inverse condemnation, is available to redress the injury occasioned by the final decision." *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1516 (11th Cir.1987); *see also Williamson County,* 105 S.Ct. at 3121 (a property owner cannot claim a violation of the Just Compensation Clause until the property owner has used the state procedure for obtaining compensation and been denied).

Appellant asserts that the temporary suspension action by the City Commission amounts to a regulatory taking and that the state does not provide an adequate procedure for seeking just compensation. The City does not dispute appellant's contention that no state remedy is available to address the alleged injury,[3] but maintains that

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3. "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the owner 'has no claim against the Government for a taking.' " *Williamson County,* 105 S.Ct. at 3121 (quoting *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1018 n. 21, 104 S.Ct. 2862, 2881 n. 21, 81 L.Ed.2d 815 (1984)). Appellant argues that Florida law fails to provide a means for obtaining just compensation for a regulatory taking. In *Corn,* we held that under Florida law the exclusive remedy available to a property owner challenging a zoning ordinance was a suit to invalidate the zoning ordinance and enjoin its enforcement. 816 F.2d at 1517. We concluded that because an action to recover just compensation is not available under Florida law to a property owner injured as a result of an invalid zoning ordinance, the property owner's section 1983 action was ripe for review. *Id.* at 1518, 1520.

(Continued on following page)

the City Commission never reached a final decision with respect to appellant's property. The City argues that there was no final decision because appellant never completed the wall that was a condition precedent to commencing business.

We believe that this case is ripe for adjudication. The City not only decided to temporarily suspend the project's approval granted by Ordinance No. 79-440 and the building permits, but it also passed an ordinance rezoning appellant's property approximately nine months later. As in *Corn*, the temporary suspension of the enabling resolution and the rezoning ordinance put a "com-

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(Continued from previous page)

The Florida Supreme Court recently held in an inverse condemnation action that a taking occurred when the state destroyed healthy trees. *Department of Aric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So.2d 101 (Fla. 1988). The court stated that although the action was a valid exercise of police power, full and just compensation was due to the nursery owners. *Id.* at 105. Implicit in the court's holding is a determination that a property owner may bring an inverse condemnation suit for the valid exercise of police power which results in a taking. We do not believe, however, that *Mid-Florida Growers* provides that an action for inverse condemnation is available to property owners for recovering just compensation for injuries sustained as a result of a zoning ordinance. While the question certified to the Florida Supreme Court characterized the state action as an exercise of police power, *Mid-Florida Growers* involved the destruction of trees, which is better described as an exercise of the right of eminent domain. The *Corn* court, after reviewing several Florida court decisions, concluded that zoning matters were "entirely distinct" from the availability of inverse condemnation suits in the context of the exercise of eminent domain power under Florida law. 816 F.2d at 1519. We therefore do not believe that *Mid-Florida Growers* should be extended to the facts of this case. Accordingly, absent the ability to recover money damages under Florida law, appellant's action is ripe for our review.

plete moratorium" on the development. 816 F.2d at 1516. Appellant could not proceed with the construction of the wall because of the stop work order. The City therefore made it impossible for appellant tto fulfill the condition precedent on which the City insisted. The rezoning ordinance[4] undeniably constituted a final, definitive position.[5]

The City argues that the South Florida Building Code establishes an appellate procedure whereby an aggrieved property owner may appeal a stop work order and the revocation or suspension of a permit to the Board of Rules and Appeals and then ultimately, by certiorari, to the Circuit Court of Broward County. The City claims that appellant should have exhausted these available state remedies before filing this section 1983 action.

"The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable." *Williamson County,* 105 S.Ct. at 3119. The powers of the Board of Rules and Appeals enumerated in the South Florida Building Code include the power to interpret the code, review decisions

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4. The City's effort to characterize the May 6 suspension as "temporary" is questionable as well. As the district court noted, the temporary suspension "in effect became permanent" because "there was no lifting of the suspension."

5. A representative of Landmark First National Bank of Fort Lauderdale, the second mortgage holder on appellant's project, testified at the rezoning hearing that the first mortgage on appellant's property was in foreclosure and foreclosure on the second mortgage was imminent. The first foreclosure was not final until March 23, 1981. Thus while foreclosure proceedings were in progress at the time of rezoning, technically appellant was the property owner who was injured as a result of the taking.

by building officials on matters regulated by the code, take certain actions with respect to unsafe buildings and suspend or revoke permits issued under the code. While the Board of Rules and Appeals is empowered to review the propriety of a stop work order, the Board does not have the power to overrule the City's zoning decision. Because the rezoning ordinance was a final decision by the City with respect to appellant's property and because the Board does not review the City's zoning decisions, we now address the merits of the takings claim.

For there to be a taking in this case the City's action must have failed to substantially advance a legitimate state interest. A government regulation will constitute a taking if it is "not reasonably necessary to the effectuation of a substantial public purpose. . . ." *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1987). This court found a regulatory taking in violation of the Constitution in *Wheeler v. City of Pleasant Grove,* 664 F.2d 99 (5th Cir. Unit B Dec.1981), *cert. denied,* 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982). In *Wheeler* a property owner obtained a permit from the city to construct an apartment complex. The permit was issued pursuant to a city ordinance. The property owner began construction on the site in reliance on the permit. Local residents opposed the development, and after a referendum the city passed a new ordinance forbidding the construction of new apartments. The new ordinance "prohibited the plaintiffs from proceeding with the construction." *Id.* at 100. This court affirmed the district court's finding that the issuance of the new ordinance was "arbitrary and capricious" and "a confisca-

tory measure" violative of the developer's fourteenth amendment rights. *Id.*

Wheeler is indistinguishable from this case.[6] The original resolution granted appellant a property interest. The rezoning ordinance denied appellant this property interest because the new classification did not accommodate a development like the wood-chipping operation. The City Commission's action therefore was a confiscatory measure. "[I]f a regulatory undertaking is confiscatory in nature, it is a taking." *Id.* at 100. We note also that although the taking did not occur simply because appellant expended a great amount of money to begin the project, this expenditure in reliance on the resolution underscores the importance of the original resolution.[7]

The City argues that the Supreme Court has held that land use regulations which promote health, safety, moral or general welfare must be upheld. *See Penn Central*, 438 U.S. at 125, 98 S.Ct. at 2659. Based on appellant's acceptance of refuse and the numerous complaints and threats of violence by area residents, the City asserts that the

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6. Appellees attempt to distinguish *Wheeler* by arguing that in *Wheeler* the public opposed the project originally approved by the city, whereas in this case adverse public sentiment arose due to a change in the proposed use, which led to the City's reappraisal of the project and issuance of the stop work order. We believe that this distinction is irrelevant. In each case a taking occurred with the passage of a new ordinance which in essence repealed the city's prior approval of a development.

7. We reject appellant's contention that the City did not have the authority to amend the ordinance and to require that the wall be completed before the operations began. Because the wall was included in appellant's proposal, appellant is estopped from preventing the City from amending the resolution to reflect this understanding.

district court correctly held that the City property exercised its police power in stopping work on the project. Appellant admits that it violated Resolution No. 79-440 by receiving inorganic materials. Appellant maintains, however, that assuming the public complaints were justified, criminal and civil remedies were available to solve any public health problems. Indeed, the city attorney recommended several alternatives to the City Commission at one of its early meetings.[8] While local regulations may have been violated, the City cannot cure such violations with a measure that violates the Constitution. As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for change." 260 U.S. at 416, 43 S.Ct. at 160. In light of the variety of avenues available to the City, its action was impermissible.[9]

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8. Citing *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10 (Fla.1976), and *Sakolsky v. City of Coral Gables*, 151 So.2d 433 (Fla.1963), the city attorney concluded in a May 2, 1980 communication to the city commissioners that appellant had acquired a vested right to proceed with the wood-chipping development. According to the minutes of the May 6 public hearing, the city attorney suggested that although appellant had a right to proceed with the planned development, the operation of a dump, which was feared by area residents, "could result in criminal penalties . . . which could serve as the basis for an injunction or civil remedy."

9. Appellant also maintains that it was deprived of procedural due process in violation of the fourteenth amendment. Appellant states that the "commission meeting of May 6, 1980 was, at best, government by applause meter conducted in wholesale defiance of the state law mandated procedures for legitimate Commission action." It is unclear from the district court's opinion whether it considered this claim, therefore we will not address the merits of this claim.

III.

We therefore reverse the district's finding that there was no taking and remand for further proceedings.

REVERSED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-5219

A.A. PROFILES, INC.,

Plaintiff-Appellant,

versus

CITY OF FT. LAUDERDALE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(Filed October 18, 1988)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 1, 1988, 11 Cir., 1988, — F.2d —).

Before FAY and VANCE, Circuit Judges, and HOFFMAN*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 15, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

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* Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

THE SOUTH FLORIDA BUILDING CODE

* * *

203.1 MEMBERSHIP: (a) Memberships of the Board of Rules and Appeals shall be as follows: eight (8) members appointed by the Broward County Commission consisting of one (1) architect, two (2) general contractors, one (1) structural engineer, one (1) mechanical engineer, one (1) electrical engineer, one (1) master electrician and one (1) master plumber; eighteen (18) members appointed by the Broward County League of Cities, consisting of two (2) architects, four (4) general contractors, two (2) structural engineers, two (2) mechanical engineers, two (2) electrical engineers, two (2) master electricians, two (2) master plumbers and two (2) firemen, which firemen shall have a minimum of ten (10) years of experience in fire prevention and/or suppression. All other members of the Board of Rules and Appeals appointed by the Board of County Commissioners and the Broward County League of Cities shall be qualified by being registered as a professional or by having been licensed as a contractor, and by having been active in their respective profession or trade for not less than ten (10) years. Members shall be residents of Broward County.

(b) (1) On January 1, 1977, the following members shall be appointed to serve a one-year term of office: three (3) members appointed by the Broward County Commission, consisting of one (1) general contractor, one (1) architect, and one (1) structural engineer; six (6) members appointed by the Broward County League of Cities, consisting of one (1) general contractor, one (1) master plumber, one (1) mechanical engineer, one (1)

electrical engineer, one (1) master electrician, and one (1) fireman.

(2) The following members shall be appointed to serve a two-year term of office beginning January 1, 1977: two (2) members appointed by the Broward County Commission, consisting of one (1) master plumber and one (1) mechanical enginner; six (6) members appointed by the Broward County League of Municipalities, consisting of two (2) general contractors, one (1) architect, one (1) structural engineer, one (1) electrical engineer, and one (1) master electrician.

(3) The following members shall be appointed to serve a three-year term of office beginning January 1, 1977: three (3) members appointed by the Broward County Commission consisting of one (1) general contractor, one (1) electrical engineer, and one (1) master electrician. Six (6) members appointed by the Broward County League of Municipalities, consisting of one (1) general contractor, one (1) master plumber, one (1) architect, one (1) structural engineer, and one (1) mechanical engineer, and one (1) fireman.

(4) All membership appointments made on or after January 1, 1978, shall be for a term of three (3) years, except in filling a vacancy for which appointments shall be made for the remainder of the former member's term of office.

(5) If a majority of the Board finds that any appointed member is unqualified because of inactivity or otherwise, the Board may request the appointing authority of that individual to remove him from the Board and make a new appointment to fill his term.

(6) All Board Members now serving, appointed or to be appointed under prior laws, shall continue to serve

the balance of their terms, provided that the terms of all members shall expire on January 1, 1977.

(c) The Appointing Authority may remove any member of the Board for misconduct, incompetency or neglect of duty; however, any member so removed may, within ten days, request a public hearing and shall receive such hearing before such removal shall be final.

(d) A vacancy in the membership of the Board, occurring during a term, shall be filled by appointment of the member from the same field, and appointment shall be for the remainder of such term.

203.2 COMPENSATION Members shall serve without compensation but shall be entitled to reimbursement for necessary expenses in performance of their official duties upon approval of the appointing authority.

203.3 MEETINGS (a) Meetings of the Board of Rules and Appeals shall be held at the call of the Chairman and/or Building Official, and at such other times as the Board may determine.

(b) The board shall select one (1) of its members to serve as chairman and one (1) to serve as vice-chairman, to act in the absence of the chairman. A detailed record of all proceedings shall be kept on file in the office of the secretary. The board shall establish rules and regulations for its own procedure.

(c) (1) All hearings shall be open to the public, and any person whose interest may be affected by the matter on appeal shall be given an opportunity to be heard.

(2) The hearing shall be informal and need not be conducted according to technical rules relating to evidence and witnesses.

(3) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rules which might make improper the admission of such evidence over objection in civil actions.

(4) Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(5) The rules of privilege shall be effective to the same extent that they are now, or hereafter may be, recognized in civil actions; and irrelevant and unduly repetitious evidence shall be excluded.

(d) No member of the Board shall sit as a voting member in any hearing involving any question in which he has personal or financial interest.

(e) Twelve (12) members of the board shall constitute a quorum. Decisions shall be reached by the majority of those present.

(f) Written notice of Board decision shall be furnished the appellant when requested.

(g) The Building Official shall take immediate action in accordance with decisions of the Board.

203.4 DUTIES: (a) APPEAL FROM DECISION OF BUILDING OFFICIAL: The Board shall hear all

appeals from the decisions of the Building Official wherein such decision is on matters regulated by this Code from any person, aggrieved thereby, and specifically as set forth in Section 204. "Alternate Materials and Types of Construction." Application for Appeal shall be in writing and addressed to the Secretary of the Board.

(b) INTERPRET CODE AT REQUEST OF BUILDING OFFICIAL: The Board shall pass on all matters pertaining to this Code and referred to the Board by the Building Official for interpretation or clarification.

(c) INVESTIGATE ENFORCEMENT: The Board of Rules and Appeals, upon the request of any person charged with the responsibility of enforcing the code, or upon its own initiative, shall conduct investigation into enforcement of this code, and shall have the power to suspend or revoke any permits issued thereunder, after a hearing at which interested persons may appear and be heard and evidence indicates that the best interests of the public are served by such action except in regard to the qualification of the applicant for permit.

(d) REPORT AND RECOMMENDATIONS: (1) The Board of Rules and Appeals may recommend to the elected officials of the jurisdictions adopting this Code ordinances prescribing the fee for examinations, permits, inspections of boilers and elevators, the testing of materials, and all other such work required by the Building Code.

(2) The board of rules and appeals shall make any desired amendments or revisions to the Code.

(e) Cost of appealing to board. Any person who appeals to the board of rules and appeals for a decision on any matter within its jurisdiction is required to pay a fee of fifty dollars ($50) to the secretary of the board of rules and appeals, and said person shall further guarantee payment of all expenses for necessary tests made or ordered by said board to ascertain whether the request of the applicant has any merit.

(f) Procedure for Appeals. Any person aggrieved by anyone enforcing the South Florida Building Code who desires to appeal to this Board shall first contact the secretary of the board for a date for his appeal to be heard. A notice of appeal shall be sent to the governing body of the jurisdiction wherein the dispute arose and said notice shall contain the following:

(1) The time and date of the hearing.

(2) A clear and concise statement of the subject to be decided on appeal sufficient to put the said governing body on notice so that they may defend their interpretation of the South Florida Building Code.

The notice shall be sent by registered or certified mail at least fifteen (15) days prior to the hearing but not more than thirty (30) days. The board in its discretion may require a specific form for this notice.

The appellant shall also file a copy of his notice of appeal with the secretary of the board at the same time that he notifies the governing body and said secretary shall deliver to each member of the board a copy of the notice with sufficient time before the hearing for the board members to study the dispute. Procedure for ap-

peals may be changed from time to time by the board if they deem it necessary for the benefit of the public.

(g) Notwithstanding, and in addition to, the jurisdiction of the Board of Rules and Appeals created by Chapter 71-575, Laws of Florida, the South Florida Building Code as applicable to Broward County may be enforced by injunctive proceedings, or other appropriate legal proceedings, in the appropriate court having jurisdiction thereof, upon petition or complaint filed by the Board of Rules and Appeals, which is hereby granted the power to sue and be sued, or by any aggrieved person, any interested citizen, citizen's association, corporation or other business entity if any elected or appointed officials named in Sec. 3 of Chapter 71-575 or any building official fails or refuses to comply with said Code.

(h) CERTIFICATION OF BUILDING OFFICIAL, BUILDING INSPECTOR, ELECTRICAL INSPECTOR AND PLUMBNG INSPECTOR: The Board of Rules and Appeals shall have the duty to accept the review applications and to certify or refuse to certify applicants for Building Official, Building Inspector, Electrical Inspector and Plumbing Inspector to be employed by any inspection authority regulated by this Code.

203.5 POWERS: (a) (1) The Board of Rules and Appeals may interpret the provisions of the Code to cover a special case if it appears that the provisions of the Code do not definitely cover the point raised, or that the intent of the Code is not clear, or that ambiguity exists in the wording; but it shall have no authority to grant variances where the Code is clear and specific.

(2) The use of alternate materials or types of construction not clearly comparable with the materials and

types of construction specified in the code may not be granted by the board of rules and appeals; but the board, if favorable to such use, may amend this code to make such use lawful.

(b) The Board shall have the power to affirm, modify or reverse the decision of the Building Official wherein such decision is on matters regulated by this Code.

(c) The Board shall have the powers as specified in Section 202, "Unsafe Buildings."

(d) The Board of Rules and Appeals shall have the power to suspend or revoke permits, as specified in paragraph 203.4 (c).

(e) When it is deemed necessary by the Board, it may request experienced and technical advice on any specific subject or subjects from any qualified person or persons, and such request may be for attendance at Board Meetings or for written analysis of the specific problem. The Board may establish Panels of Industry, either standing or temporary, for technical analysis of specific subjects.

203.6 RECIPROCITY: (a) The Board of Rules and Appeals shall have the authority to meet with similarly constituted and authorized boards for the purposes of discussion, decision and similar matters of area-wide industry concern.

(b) Decisions of the majority of all members at joint meetings, as referred to herein, shall not be binding on the Board of Rules and Appeals. The decisons of joint meetings with other boards may be accepted or rejected or accepted with modifications.

203.7 COURT REVIEW: (a) Any person aggrieved by a decision of the Board of Rules and Appeals, whether or not a previous party to the decision, may apply to the appropriate court for a writ of certiorari to correct errors of law of such decisions.

(b) Application for review shall be made to the proper court of jurisdiction within five days after the decision of the Board.

* * *

SECTION 47-31. BOARD OF ADJUSTMENT

Sec. 47-31.1. Board of adjustment; composition, meetings; quorum.

The board of adjustment of the city is a board created by the city charter, consisting of five regular members and three alternate members appointed for definite terms as set out in the city charter. The board of adjustment shall meet regularly on the second Tuesday of each month at 7:30 p.m. in the city commission room at the city hall. The board may meet at other times fixed by ordinance, or after two (2) weeks' notice to members. Four members shall constitute a quorum.

Sec. 47-31.2. Powers and duties of the board.

The board of adjustment shall possess the powers and perform the duties prescribed by the city charter and the "Code of Ordinances of the City of Fort Lauderdale," and none other.

Sec. 47-31.3. Form of notice of appeal; filing fees.

In matters where the board of adjustment has jurisdiction, appeals may be taken by any person affected seeking a determination or seeking relief in any of the categories in which the board of adjustment has jurisdiction, such appeal to be perfected by filing with the clerk of the board of adjustment a notice of appeal upon a form prescribed and furnished by said clerk, substantially as follows:

"NOTICE OF APPEAL

No. .....

TO: Board of Adjustment of City of
Fort Lauderdale, Florida.

The undersigned aggrieved person does hereby take an appeal to the Honorable Board from the decision of .....
or praying relief by the board in a matter where the Board of Adjustment has jurisdiction.

Appellant seeks the decision of the board, as follows: .....

Kindly transmit to the Board of Adjustment all papers constituting the record in this matter.

DATED this the ..... day of ....., 19.....

.....
Aggrieved Person"

Such notice shall be numbered and preserved as a permanent record.

Applications to the board of adjustment for variances, requests for continuances, requests for rehearings, rehearings or other appeals shall be filed at the building and zoning department on forms furnished by that office. They shall be accompanied by the following fees:

• • •

(6) *All business, industrial and special districts (B-1-A, B-1, B-1-B, B-1-C, B-2, B-3, B-3-C, M-1, M-1-A, G-A-A, SP-1, etc.):*

(a) 0—10,000 square feet:

1. Applications filed before construction or proposed use is implemented or existing:
Variance application $250.00

Request for continuance (by applicant) 250.00
Request for rehearing 125.00
Rehearing before the board 250.00

2. Applications filed after construction or proposed use is implemented or existing:
Variance application $500.00
Request for continuance (by applicant) 500.00
Request for rehearing 250.00
Rehearing before the board 500.00

(b) 10,001—30,000 square feet:

(1) Applications filed before construction or proposed use is implemented or existing:
Variance application $300.00
Request for continuance (by applicant) 300.00
Request for rehearing 150.00
Rehearing before the board 300.00

(2) Applications filed after construction or proposed use is implemented or existing:
Variance application $600.00
Request for continuance (by applicant) 600.00
Request for rehearing 300.00
Rehearing before the board 600.00

(c) 30,001—50,000 square feet:

1. Applications filed before construction or proposed use is implemented or existing:
Variance application $350.00
Request for continuance (by applicant) 350.00
Request for rehearing 175.00
Rehearing before the board 350.00

2. Applications filed after construction or proposed use is implemented or existing:

Variance application	$700.00
Request for continuance (by applicant)	700.00
Request for rehearing	350.00
Rehearing before the board	700.00

(d) Over 50,000 square feet:

(1) Applications filed before construction or proposed use is implemented or existing:

Variance application	$400.00
Request for continuance (by applicant)	400.00
Request for rehearing	200.00
Rehearing before the board	400.00

(2) Applications filed after construction or proposed use is implemented or existing:

Variance application	$800.00
Request for continuance (by applicant)	800.00
Request for rehearing	400.00
Rehearing before the board	800.00

• • •

Sec. 47-31.4. Proceedings on appeal.

Upon the filing on an appeal in proper form upon the form prescribed and the payment of filing fee, the clerk of the board of adjustment shall process said appeal as follows:

(a) A copy of such appeal shall be furnished to the city manager, city engineer, city attorney, and members of the city commission at least five (5) days before the meeting at which same will be considered.

(b) The agenda of the board of adjustment shall be published in one issue of the official newspaper at least five (5) days before the meeting of the board of adjustment.

(c) If the appeal is from a decision of an administrative officer in the enforcement of zoning regulations of the city, the clerk shall obtain from the officer whose decision is appealed a statement in writing of the points involved, and his interpretation of the ordinances or regulations governing same and his ruling thereon, and shall furnish copies of such statement to the city manager, the city engineer, the city attorney, and members of the city commission at least five (5) days before the meeting at which the appeal will be considered.

(d) If the appeal is one seeking relief, statement by appellant as to why such relief should be granted shall be set out in the appeal.

(e) No appeal to the board of adjustment shall be placed upon the agenda of the board or considered by the board sooner than twenty (20) days after filing of such appeal in proper form with the clerk.

(f) Owners of lands within three hundred (300) feet of property under consideration for a variance or special exception shall be notified of the appeal and the time and place of the public hearing. For purposes of notification, the owners shall be considered to be the names shown on the records in the city treasurer's office to whom billing is made for special assessments. Except when otherwise required by law, condominium, cooperative and time share associations shall be notified when listed on these records and shall be responsible for notifying individual owners or members of their association. The notice shall be mailed to the address shown at least ten (10) days before

the date of the hearing. Failure to receive the notice shall not invalidate the hearing, as this provision is directory and not mandatory.

(g) If an application for a variance or special exception or both has been denied by the board of adjustment, no new application for such variance or special exception or both may be made within a period of two (2) years from the date of such denial; provided, however, that the board of adjustment may grant a rehearing upon an application for a variance or special exception which has been denied in accordance with the following procedures:

(1) An applicant whose application for a variance or special exception or both has been denied by the board of adjustment may request a rehearing before the board of adjustment by filing a written request for such rehearing with the director of building and zoning within thirty (30) days after entry of the order of the board denying the application. Such written request must set forth in detail either the nature of any alleged error on the part of the board or the substance of any new evidence or information not considered by the board when the application was denied and why such new evidence or information justifies a rehearing. Such new evidence or information must neither have been known to the applicant nor discoverable or obtainable through reasonable diligence on the part of the applicant prior to the hearing at which the application was denied.

(2) A copy of such written request for rehearing shall be distributed by the director of building and zoning to each board member who voted upon the application at the prior hearing. Should three (3) or more of the board mem-

bers find that such request is properly based upon either of the grounds authorized in (1) above, such members may instruct the director of building and zoning to place the request for rehearing on the next available board of adjustment agenda. If the director of building and zoning does not receive such an instruction within thirty (30) days of distribution of the written request as hereinabove set forth, he shall notify the applicant that the request for rehearing will not be heard by the board.

(3) At the hearing upon the request for a rehearing, the board of adjustment shall only consider reasons why a rehearing should be granted, which reasons shall be limited to the following categories:

a. That a rehearing is necessary in order to correct an error;

b. That a rehearing is necessary in order for the board to consider new evidence or information not considered by the board when the application for a variance or special exception was denied, such evidence or information having been neither known to the applicant nor discoverable or obtainable through reasonable diligence on the part of the applicant prior to the hearing at which the application was denied.

Upon a motion to rehear the application, the request for rehearing shall be granted if the motion receives the affirmative vote of four (4) members of the board. The board shall indicate in its order granting the rehearing the reason why such rehearing is necessary.

(4) If a request for rehearing is granted, the director of building and zoning shall place the application for a variance or special exception upon the agenda of the board of adjustment for rehearing and property owners shall be notified as provided in section 47-31.4(f).

(5) A written request for a rehearing or a written or verbal request for a continuance made by the applicant shall be accompanied by a fee as prescribed by section 47-31.3 of this Code.

No fee for a continuance will be imposed if the board, on its own motion, decides to continue the case.

(6) The fee required to accompany the request may be waived by the director of building and zoning if the applicant demonstrates that payment of the fee constitutes a true economic hardship. Prior to waiver of the fee, the applicant shall execute an affidavit, on forms to be provided by the director, as to such economic hardship. In making the determination as to fee waiver, the director shall consider the financial resources of the applicant, including:

a. Ownership of, or equity in, tangible or intangible realty or personalty and the value thereof;

b. Amount of debts outstanding and owed by the applicant; and,

c. The annual income of the applicant and the source(s) from which it is derived.

Sec. 47-31.5. Decision of the board.

The decision of the board of adjustment in every case shall be one of the following:

(a) Granting a temporary permit for a nonconforming use expiring September thirtieth after date of issuance, and no removal or additional nonconforming permit shall be granted.

(b) Holding that the ruling or decision made by an administrative official in the enforcement of the zoning regulations of the city is correct in point of law and should be upheld.

(c) Holding that the ruling or decision made by an administrative official in the enforcement of the zoning regulations of the city is incorrect in point of law and should be reversed or modified.

(d) Holding that the ruling of the officer as to zoning regulations or ordinances is correct in point of law, but owing to special conditions, a literal enforcement of the provisions will result in unnecessary hardship in the use of the property involved, and granting permission to the appellant to violate the strict terms of the zoning ordinance in the respects stated in the order, which will uphold the spirit of the ordinance and yet permit substantial justice to be done.

(e) Authorizing variance and special exceptions to the terms of any zoning regulations in the specific case where the board finds and determines that such variance will not be contrary to the public interests and the general spirit and intent of the zoning regulations, and where owing to special conditions, a literal enforcement of the provisions of the zoning regulations will result in unnecessary hardship in the use of the property involved. The board shall specify the hardship existing and the reason why the board granted the variance permit.

The concurring vote of four (4) members of the board of adjustment shall be necessary to give validity to any

decision of the board. If any appeal does not receive four (4) affirmative votes of the board of adjustment at the meeting at which considered, the appeal shall be considered denied. The decision of the board of adjustment shall be recorded in its minutes.

Sec. 47-31.6. Order of the board.

In each case wherein final action is taken by the board of adjustment upon any matters before it for consideration, the decision of the board shall be recorded in the minutes of its meetings and thereafter the recording secretary of such board shall prepare, in triplicate, upon appropriate forms supplied for such purposes, an order to be entered to evidence such decision, which order shall set out with sufficient clarity and succinctness the exact right or privilege given, a correct legal description of the lands and premises affected, the time within which the property must be converted to the use as varied, said time limit to be established by the board and which time period shall not exceed three (3) years from the date of the variance, and the particular decision made by such board, in substance as follows:

"ORDER OF BOARD OF ADJUSTMENT

No. .....

This matter was heard by this Board on ....., 19....., upon final hearing upon the appeal of ..... wherein the said appellant sought a decision by this Board whether ..... and the matter having been regularly heard, and all parties entitled to notice having received notice, it is

ORDERED by the Board of Adjustment of the City of Fort Lauderdale that the application is.....

(granted) ..... (denied) and the Board of Adjustment determines, finds and declares that .....

The variance right given hereunder shall expire unless the property is converted to such use within

(to be established by the board, but in no event to exceed three years from the date of variance.)

THIS the ..... day of ....., 19.....

.....

Chairman of the Board of Adjustment"

No action of the board of adjustment shall be considered legal and binding until such written order has been entered in triplicate. Such order shall be drafted by the clerk within five (5) days after the meeting of the board and submitted to the chairman or vice-chairman for his signature. Such orders shall be numbered consecutively to correspond with the numbers of the appeals to the board of adjustment. One copy of such order shall be kept by the board of adjustment, one copy forwarded to the city clerk to become a public record, and one copy forwarded to the appellant. The city clerk shall certify true copies of such orders upon request.

Sec. 47-31.7. Applications for permission to erect filling stations, etc.

Application to the board of adjustment for permission to erect a filling station, public garage, or repair shop, under the provisions of section 47-51 in instances where permit has been refused by the building inspector shall be treated and considered as an appeal and subject to all of the conditions and regulations pertaining to appeals.

EXCERPTS FROM REGULAR MEETING OF CITY COMMISSION 3/10/81 (EXHIBIT 101)

Regular Meeting

Motion made by Commissioner Cox and seconded by Commissioner Mills that the hearing be closed. Roll call showed: YEAS: Commissioners Cox, Frazer, Mills, Allen, and Mayor-Commissioner Young. NAYS: none.

The City Attorney pointed out it was alright to close the hearing if no one wished to speak but there were people who did not have a copy of the agenda. He did not know if they had a presentation to make. He continued by saying a question had been asked him as to how the City could rezone the land when there was still in effect the resolution which allowed the wood chipping operation which was, of course, temporarily suspended. He had responded by stating they were talking about rezoning the land for future uses. If there were a vested right for those people to proceed with that wood chipping operation, it would exist irrespective of the zoning. If they had a right to operate under that resolution and that zoning, they could do so under a theory completely different from rezoning. The City Commission may rezone the property today but to the extent that someone went to litigation to determine that that other use had acquired a vested right to operate, they might then be allowed to use the property. Mayor-Commissioner Young understood that was not part of this question. The City Attorney pointed out that it was almost inseparable from the question but in rezoning the property, he did not think the Commission should be concerned with the prior use. It was either valid or it was not.

It was observed that there were people present who wished to be heard on this item. Commissioners Cox and Mills stated they would withdraw the motions to close the hearing. The Commissioners agreed.

Mayor-Commissioner Young inquired how many would like to be heard on this item. There were four present in favor and four opposed.

Mrs. Leola R. McCoy, reported this had been a long and trying process for all, starting in March or April of last year. The petition to rezone was the result of the L.E.P. Homeowners Association which felt the need to guard against future development of the M-1 properties. At first there was the operation which was suspended because of violations of the environmental situation and Mrs. McCoy reminded the Commissioners that she not only lived in the community but that her property was just about 100′ from the operation which abutted the east of her property. As the applicant, she was simply speaking for her co-petitioners in asking that an affirmative resolve be reached here. At the December 17th Planning and Zoning Board meeting, the Planning and Zoning Board had voted unanimously to accept the recommendation. Mrs. McCoy inquired if the Commissioners had a copy of the January 5, 1981 Memorandum No. 80-884 addressed to the Commissioners. According to the rezoning request, the Board at that time had voted unanimously to uphold the recommendation of the rezoning from the M-1 to B-3-C which was light industry. Mrs. McCoy read as follows from Memorandum No. 80-884 the reasons innumerated.

> a. The B-3-C district was created for areas just such as this where we need special consideration and site plan approval to protect sensitive residential areas,

but still preserve the land for warehouse and light industrial.

b. It can be noted that the greatest problem cities face when they get older is the vast cost of rehabilitating blighted areas—the five block urban renewal area west of the F.E.C. will cost millions alone. It is far more economical to prevent this from happening by controlling possible blighting influences.

c. B-3-C will still preserve the tract for job-creating industry and be consistent with both the City and County Land Use Plans.

d. The residential areas are presently occupied by professional and white collar workers, including many of the Black community leaders. They will only stay as long as a good environment is maintained. If it is not, and they leave, the City will have only the low income groups which require expensive social programs and pay little taxes.

• • •

FORT LAUDERDALE CODE, ZONING "B-3" DISTRICT

FORT LAUDERDALE CODE, ZONING "M-1" DISTRICT

SECTION 47-19. "B-3" DISTRICT

Sec. 47-19.1. Uses permitted.

The uses permitted in B-3 district shall be as follows:

(a) Any use permitted in B-2 district, except residential uses including one and two family dwellings, multiple-family dwellings, apartments and apartment houses, hotels, motels, boarding and lodging houses, guest houses, town houses and group housing, except as an accessory to a permitted use.

(b) Any business or establishment of a general wholesaler or service type.

(c) Bakeries.

(d) Dry cleaning establishments and laundries.

(e) Bottling works.

(f) Light manufacturing or industrial plants.

(g) Lumber or material storage yards.

(h) Railroad freight and passenger depots, together with facilities necessary and incidental thereto.

(i) Carting, express, hauling or storage yards.

(j) Blacksmith or horseshoeing shops.

(k) Contractors' plants and storage yards.

(l) Coal, coke and woodyards.

(m) Sale of house trailers.

(n) Miniature motor vehicles, including those known as "go-karts," with motors not in excess of four (4) horsepower; the speed of which go-karts shall not be in excess of twenty-five (25) miles per

hour and which speed shall at all times be controlled by the use of governors. Not more than five (5) go-karts shall be operated at any one time at any one place. All such go-karts shall be provided with adequate mufflers; and no operation of such vehicles shall be permitted between the hours of 11:00 p.m. and 8:00 a.m. No racing shall be permitted.

(o) Commercial blood donor facility: Any facility, the primary function of which is to process or to obtain, by venipuncture or plasmapheresis, blood or plasma, and for which consideration is given or received.

(p) Photographic processing laboratory; wholesale processing of photographic film, including film received from scheduled pickup and delivery routes serving retail stores.

Sec. 47-19.2. Uses prohibited.

The uses prohibited in B-3 district shall be as follows:

(a) The use of any portion for open storage without a wall constructed in accordance with section 47-40.1 a minimum of six (6) feet six (6) inches in height which completely screens such storage area from abutting property and all public ways.

(1) In no case shall stored material be permitted to exceed the height of the required screening wall.

(2) Reasonable ingress and egress shall be permitted; however, all openings in the required wall shall be provided with an opaque gate of the same height, which shall be kept closed except when opening is necessary for conduct of business.

(3) Special exceptions from the requirements of this section may be granted after review by the director of building and zoning and the

city planner where it is found that the nature of the storage operation and the manner in which it is conducted (lumber yards and containerized shipping operations may qualify, for example) will not have adverse effect on surrounding property or the public if requested exceptions are granted.

(b) Any industry, or business which is obnoxious because of dust, dirt, smoke, fumes, odors, noises, vibrations, radioactive waves or dangerous hazards.

(c) Any use not specifically permitted in section 47-19.1.

(d) Any business abutting residential property without a wall constructed in accordance with section 47-40.1 five (5) feet in height separating such premises from abutting residential property.

(e) Automobile towing and wrecker services and storage yards.

SECTION 47-19.7. "B-3-C" DISTRICT PLANNED WAREHOUSE-LIGHT INDUSTRIAL

Sec. 47-19.7.1. Purpose of district.

The B-3-C district is a planned warehouse and light industrial district. It is intended for tracts which, due to relationship to residential areas, retail business areas, public facilities and traffic and transportation facilities, require special provisions to be utilized for warehouse and light industrial use and insure a development consistent with the zoning pattern and present and probable future land use in the area. These provisions depend on the details of site and building design and include the use, appearance, height, bulk and location of principal and accessory buildings, and the location and design of land-

scaping, parking areas, roadways and other features. Review and approval of a development plan are required to insure such provision will be provided.

Sec. 47-19.7.2. Uses permitted.

Any use permitted in a B-3 district if approved by the planning and zoning board. Hotel suites are also permitted, subject to such board approval and subject to administrative review and approval by the city planning division, under the condition specified in the Broward County Land Use Plan and certified city land use plan.

Sec. 47-19.7.3. Uses prohibited.

Any use prohibited in B-3 district or not approved by the planning and zoning board.

Sec. 47-19.7.4. Building height.

The maximum building height shall not exceed that specified in B-3 district or as shown on the approved development plan.

Sec. 47-19.7.5. Yards.

Yards shall meet the minimum requirements specified for B-3 district and as shown on the approved development plan.

SECTION 47-20. "M-1" DISTRICT

Sec. 47-20.1. Uses permitted.

The uses permitted in M-1 district (Industrial) shall be as follows:

(a) Any use permitted in B-3 district except retail business uses not ancilliary to a manufacturing,

processing, assembly, maintenance, repair or warehousing operation, or as hereinafter provided.

(b) Auto wrecking yards, salvage yards, junk dealers and other types of business using open storage where open storage area is completely screened from abutting property and all public ways by a wall constructed in accordance with section 47-40.1 a minimum of six (6) feet six (6) inches in height.

(1) In no case shall stored material be permitted to exceed the height of the required screening wall.

(2) Reasonable ingress and egress shall be permitted; however, all openings in the required wall shall be provided with an opaque gate of the same height, which shall be kept closed except when opening is necessary for conduct of business.

(3) Special exceptions from the requirements of this section may be granted after review by the director of building and zoning and the city planner where it is found that the nature of the storage operation and the manner in which it is conducted (lumber yards and containerized shipping operations may qualify, for example) will not have adverse effects on surrounding property or the public if requested exceptions are granted.

(c) Any lawful operation of an industrial or manufacturing nature which is not obnoxious because of dust, dirt, smoke, fumes, odors, noise, vibrations, radioactivity or explosion hazard.

(d) Any use provided for in section 47-20.2 after approval has been obtained as therein provided.

(e) Heavy commercial uses, such as lumber yards, machinery sales, farmers markets, fence fabricator

and sales, fuel sales and storage other than gasoline service stations, plumbing equipment sales and service, pump and well sales and services including sprinkler systems, restaurant and hotel equipment sales and services, sign shops, swimming pool and supplies sales and services, sales and servicing of boats and aircraft, sales and servicing of trucks, campers and mobile homes, uses of similar kinds and characteristics.

(f) Professional and business offices.

(g) Commercial, office and business uses that are major employment centers.

(h) Other retail uses and hotels and motels and tourist accommodations under the condition specified in the Broward County Land Use Plan and Certified City Land Use Plan.

Sec. 47-20.2. Uses permitted where site approved.

Whenever application is made for a building permit to erect any building or improvement upon any site in M-1 district wherein the premises in the opinion of the building inspector may be or are contemplated being used for:

(a) Acid manufacture.

(b) Cement and lime manufacture.

(c) Manufacture or storage of explosives.

(d) Meat packing plants, stock or slaughter yards.

(e) Petroleum storage, refining or transfer.

(f) Rendering plants or glue works.

(g) Pulp or paper mills.

(h) Fertilizer plants or fertilizer mixing.

(i) Radio and television towers.

(j) Any operation which may be obnoxious because of emission of dust, dirt, smoke, odors, fumes or abnormal explosion hazards.

(k) Industries detrimental to health and welfare of inhabitants of the city.

The building inspector shall refuse to issue a building permit until the use of such site for such purpose has been approved by resolution of the city commission, after written report by fire and health departments, and recommendations of city planning and zoning board have been submitted to city commission.

Sec. 47-20.2.1. Uses prohibited.

Any business abutting residential property without a wall constructed in accordance with section 47-40.1 five (5) feet in height separating such premises from abutting residential property.

Sec. 47-20.3. Building height limit; additional setback.

The maximum building height of all structures shall be one hundred (100) feet, except that a maximum height of one hundred fifty (150) feet may be permitted, provided that an additional set back of at least one foot per foot of height is provided from all setback lines for portions of the structure in excess of one hundred (100) feet.

Sec. 47-20.4. Yards.

(a) *Front yard.* Shall be a minimum of five (5) feet, in depth measured from the property line for any portion of a structure less than nine (9) feet in height above finished grade. Above nine (9) feet the building may extend

into the yard area. All yards abutting a street shall be considered front yards, and the five-foot yard shall be measured from the setback line established for greater street width in section 47-52 of the Code if applicable. Where there is an existing public sidewalk ten (10) feet or more in width such yard requirements shall be waived by the director of building and zoning and transportation director.

(b) *Side yard.* A ten-foot side yard shall be provided on the side of a lot directly adjoining residential property on that side.

(c) *Rear yard.* A fifteen-foot rear yard shall be provided on the rear of a lot directly adjoining residential property on the rear.

Article X, section 6, FLORIDA CONSTITUTION

Eminent domain

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

(2)

No. 88-1217

FILED
MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

CITY OF FORT LAUDERDALE, et. al.,

Petitioners,

v.

A. A. PROFILES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF THE CITY OF FORT LAUDERDALE, et. al., FOR WRIT OF CERTIORARI

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18 pp

RESTATEMENT OF THE QUESTION PRESENTED

Petitioners' Statement of the Case is directed to the merits of this dispute and not the Jurisdiction of this Court. The following correctly sets forth the question at issue:

> SHOULD THIS COURT REVIEW BY CERTIORARI AN "ANCILLARY HOLDING" OF A FEDERAL APPELLATE COURT FOR THE PURPOSE OF CORRECTING "MISAPPREHENSIONS" OF STATE LAW?

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STATEMENT OF THE CASE

The present controversy began with A. A. Profiles' (Profiles) attempts to develop a twenty eight acre piece of property that had been zoned M-1, Fort Lauderdale's least restrictive industrial classification "since at least 1948."[1] Even though a residential area had developed to the point where it abutted portions of the parcel in question, the land was still designated "industrial" under both City and County land use plans when Profiles interest emerged in 1979.

Profiles planned to utilize the property as a site at which to operate a facility for the conversion of felled trees and other woody plant material into wood chips for use in landscaping and plywood manufacture. M-1 zoning allowed salvage yards, oil refineries and rendering plants. The ordinance establishing the M-1 classification, however, provided that where excessive dust or noise might be associated with a particular use, approval by the City's Fire and Health Departments, its Planning and Zoning Board, and, finally, by the City Commission were required. The Commission is Fort Lauderdale's governing body under the City's commission manager plan of government.

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1. The matters contained in this Statement of The Case are distilled from Fort Lauderdale City Attorney Communication Number 80-457, which is included in the Appendix to this brief, as well as from the opinions of the Eleventh Circuit and the findings and conclusions of the trial court. The rulings of both courts as well as the applicable zoning ordinances are included in the Appendix to the Petition.

Because the woodchipping operation was considered to be a use which could produce excessive dust or noise, Profiles was required to, and did, submit its development plans for review as required. When the Commission ultimately gave its approval, the woodchipping operation becane a legally permitted use. When Profiles relied on that approval, and did so the extent of several million dollars, the legally permitted use matured into a vested property right.

In late April of 1980, with land clearing practically completed and construction in progress, the City began receiving complaints about the nature of Profiles' activities. On May 6, 1980, those complaints found their way to the City Commission. Rather than simply enforce its public health regulations as the City Attorney advised, and despite an explicit warning from their own lawyer that the City could not constitutionally interfere with Profiles' now vested property rights, the Commission proceeded to do exactly what the CityAttorney said could not be done lawfully and "temporarily suspended" Profiles' development rights.

While Profiles was open to reasonable alternatives, the City would have none of it. The "temporary suspension" in the words of the Trial Judge, "in effect became permanent"[2] (Petitioners' Appendix, 21a). Eventually, the

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2. This case does not represent the only instance in which a Florida municipality has sought to stall a politically unpopular project into oblivion, *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987); *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10, 14, 15 (Fla. 1987). Such a course of

(Continued on following page)

City rezoned the property to a classification that the trial Judge found "wouldn't permit anything like a wood-chipping operation" (Petitioners' Appendix, 15a). Ultimately, Profiles became unable to meet its expenses. Foreclosure, and this lawsuit, resulted. Profiles' complaint, incidentally, contained an inverse condemnation count in addition to the request for relief under 42 U.S.C. 1983 (Petitioners' Appendix, 9a).

SUMMARY OF ARGUMENT

Petitioners request this Court review an "ancillary holding" of the Eleventh Circuit to rectify what is said to be a "misapprehension of Florida law." No reason is given why this Court should depart from the deference historically given determinations of state law made by the lower federal courts. Should there be a need to clarify Florida law, the particular issue should be presented to the Florida Supreme Court in an appropriate case.

Further, of the cases cited for direct conflict, only one even mentions Florida law. On the point addressed, that decision agrees with the conclusion of the Eleventh Circuit.

Lastly, this case is materially different on its facts from any of the decisions on which Petitioners rely.

(Continued from previous page)

conduct has also been pursued as an attempt to insulate from challenge an otherwise illegal zoning change. *Hollywood Beach Hotel Co.*, 329 So.2d at 16. As is reflected in *Corn*, Florida municipalities fight such wars of attrition with astonishing persistence.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT CANNOT EFFECTIVELY RESOLVE A QUESTION OF STATE LAW

In *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct, 2561, 91 L.Ed.2d 285 (1986) and *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court addressed unresolved issues of national import. Once those cases had been decided however, the application of the principles announced to the facts of any particular case is a matter of far more restricted concern. Here, for example, the broadest significance even Petitioners attribute to what they characterize as the Eleventh Circuit's "misapprehension" is its "impact on state law."

Interpretations of state law by the federal courts are not binding on the state judiciary, *see, Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1987). Consequently, even were Petitioners correct in their assertion that an "ancillary holding" of the Court of Appeals represents a "misapprehension of Florida Law," the impact of that ruling on State law is questionable at best, and in any event, is a matter more appropriately left to the Supreme Court that sits in Tallahassee. Or, as this Court has phrased it:

> [A] challenge to state law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review.

Haring v. Prosise, 462 U.S. 306, 314, n.8, 103 S.Ct. 2365, 2373, 76 L.Ed.2d 595 (1983).

There is little reason for this Court to review matters that can be resolved definitively only by the highest court of a State.

II. THE ELEVENTH CIRCUIT'S DECISION CORRECTLY APPLIES THE LAW AS ANNOUNCED BY THIS COURT AND IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUIT COURTS

This Court, in *MacDonald* and *Williamson County*, imposed a requirement of administrative finality on regulatory takings claims. While finality is the federal requirement, the procedure by which finality is attained is determined by state statute or even municipal ordinance. Similarly, and perhaps obviously, the question of whether state law affords a means by which compensation may be obtained when regulation "goes too far" is determined with reference to what local law allows.

In this case, the Court of Appeals concluded that, under the ordinances of the City of Fort Lauderdale in effect at the time, the evidence demonstrated that the local authorities had in fact arrived at a "final, definitive position."[3] Further, reiterating and elaborating upon the

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3. Petitioners' suggestion that Profiles was required to submit this dispute to either the Board of Rules and Appeals or the Board of Adjustment confuses finality with exhaustion. The procedure before either agency involves an appeal from an initial decision by an administrative official. An appeal, by definition, is not part of the initial decision making process. *Williamson County Planning Commission v. Hamilton Bank*, 473

(Continued on following page)

holding of a different panel of the court in *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) the Eleventh Circuit, in this case, held that, in matters related to zoning, Florida law did not provide any means by which compensation could be obtained for losses inflicted by regulation gone too far.[4]

The decisions of the Ninth Circuit in *Austin v. City and County of Honolulu*, 840 F.2d 678 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 136 (1988); *Shelter Creek Development Corp. v. Oxnard*, 838 F.2d 375 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 136 (1988); *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987); and *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, amended 830 F.2d 968 (9th Cir. 1987) together with the decision of the Seventh Circuit in *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988) are simply illustrations of the same principles announced in *MacDonald* and *Williamson County* to various aspects of government regulation as practiced in Hawaii, California, and Illinois. What differences may

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(Continued from previous page)

U.S. 172, 193, 105 S.Ct. 3108, 3119, 3120, 87 L.Ed.2d 124, 126, 143 (1985). In any event, neither agency has the authority to either participate in, or pass upon, decisions of the City Commission in zoning matters.

4. In either *Corn* or this case, the two separate panels of the Eleventh Circuit, each of which included a Judge who is a member of the Florida Bar, reviewed all the avenues Petitioners suggest might be available to provide compensation in a regulatory takings case. The Court of Appeals concluded that Florida law provides no means by which compensation may be obtained in such cases. Petitioners suggest no basis upon which this Court should abandon the deference it historically has given to interpetations of state law made by the lower federal courts. *E.g., Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-30, 66 S.Ct. 445, 451, 90 L.Ed. 358 (1946).

exist between those decisions and the conclusions of the Eleventh Circuit in this case reflect nothing more than variations in local regulatory practice.

Petitioners' statements claiming direct conflict notwithstanding, in only one of those decisions is Florida law so much as mentioned. In *Austin*, the Ninth Circuit cited *Corn* for the proposition that Florida law did not allow a damage remedy in regulatory takings cases and went on to distinguish the case before it on the basis that the question was still open under the controlling law of Hawaii, *Austin*, 840 F.2d at 681.

Consensus among the Circuit Courts on matters of federal concern is not a matter requiring this Court's attention.

III. THIS CASE IS DISTINGUISHABLE FROM OTHER REGULATORY TAKING CASES ON ITS FACTS

The facts also distinguish this case from decisions such as those cited by Petitioner. To the extent that the latter group of cases can be said to have any common denominator at all it is that the land owner filed suit *in media res*. The developer failed to follow the initial decision making procedure through to its conclusion prior to filing suit. Had Profiles balked at any of the numerous concessions the City demanded and filed suit while the approval of its project was pending, it would have found itself with no final decision.

Unlike the owners in those cases, Profiles persevered and ultimately won approval for its project from the City

Commission. With the passage of Resolution 79-440, Profiles proposed development became a legally permitted use. Under the City's M-1 zoning ordinance, the commission was the highest and final authority having power to determine whether or not a specified conditional use would be allowed within the exitsing zoning. Consequently, the enabling resolution cannot be described as anything but a "final definitive position" respecting the application of the City's M-1 zoning ordinance to the property Profiles was to acquire. The impression Petitioners Statement of The Case is written to convey notwithstanding, the process of legitimate administrative review was over five months before the incidents giving rise to this case even began.

Were that not enough, when the City did "temporarily suspend" Profiles development rights the result was a building moratorium indistinguishable in effect from that produced by the ordinance this Court considered in *First English Evangelical Lutheran Church of Glendale v. City and County of Los Angeles*, ___ U.S. ___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The "temporary suspension" was followed by a rezoning which, Petitioners argue, "had no application to Profiles." Thus, the actions of the City in this case would have effected a taking of Profiles property even had the final rezoning – the sole basis on which Petitioners quarrel with the decision of the Eleventh Circuit – never occurred. If everything Petitioners claim were true, the result in this case would be exactly the same.

CONCLUSION

Respondent respectfully requests that this Court reject the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

TO: Mayor E. Clay Shaw, Jr.
Vice-Mayor Virginia S. Young
Commissioner Robert O. Cox
Commissioner Richard A. Mills, Jr.
Commissioner Bert Frazer

FROM: Donald R. Hall, City Attorney

DATE: May 2, 1980

RE: Profiles, Inc. Wood Chipping Operation

CITY ATTORNEY COMMUNICATION
#80-457

At the request of the City Manager I have reviewed the facts and circumstances surrounding the various approvals of the wood chipping operation proposed by Profiles, Inc. and the legal effect of Resolution No. 79-440 which authorized the establishment of the subject use on the M-1 zoned parcel of property located at Northwest 23rd Avenue and 19th Street. For the reasons outlined below, it is my opinion that the City of Fort Lauderdale may not now rescind Resolution No. 79-440 or refuse to issue the appropriate building permits to Profiles for the purpose of terminating that property owner's wood chipping operation.

The subject parcel of property has been zoned M-1, the City's least restrictive industrial and manufacturing zoning category, since at least 1948. This parcel of land is designated as "Industrial" by both the Broward County Land Use Plan and Fort Lauderdale's certified plan, "Land Use 2000". In addition to a variety of heavy industrial uses, property zoned M-1 may be used for "auto wrecking yards, salvage yards, junk dealers and other

types of businesses using open storage . . . " when such open storage areas are enclosed by a wall at least six feet six inches in height (Sec. 47-20.1(b) of the Code) without the necessity of securing the types of approvals that have been required of Profiles.

In this particular instance the Director of Building and Zoning determined that there was a possibility that the proposed wood chipping operation might be accompanied by an excessive level of noise or dust. Accordingly, pursuant to Section 47-20.2(j), this proposed use of the subject parcel was investigated by the Fire Department and the Broward County Health Department. In addition, a study of the noise levels to be generated by this proposed use was reviewed by both the City's Building and Zoning Department and the Broward County Environmental Quality Control Board. By the time this proposal reached the City's Planning and Zoning Board it had been reviewed and approved by agencies of state, county and city government. After a public hearing, the Planning and Zoning Board unanimously recommended that the City Commission adopt a Resolution approving the establishment of Profiles' wood chipping operation at the proposed site.

Based upon the recommendations of the several agencies described hereinabove and the Planning and Zoning Board, the City Commission adopted the aforementioned Resolution No. 79-440 at its meeting of December 4, 1979. At that point, the wood chipping operation for which Profiles had sought approval, became a legally permitted use of the subject property pursuant to Section 47-20.1(d) of the Code.

Having obtained the required governmental approvals, Profiles acquired the property and began the process of clearing the land and constructing the necessary walls and other structures required for the establishment of its wood chipping operation. We have been advised by its Attorney that Profiles has expended and incurred future financial obligations totalling approximately $3.9 million dollars in connection with this project, all in reliance upon both the existence of the M-1 zoning classification of the property and the above-mentioned governmental approvals.

In a long and uninterrupted line of decisions, Florida's Courts have held that where a property owner in good faith and in reliance upon an act of government (such as approval of a conditional use) has made a substantial change in position or has incurred extensive obligations, the government may not rescind its approval of, or refuse to issue building permits for, the approved use. In circumstances such as these, the property owner has acquired a vested right to proceed with the establishment of the approved use. (*Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963), *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10 (Fla. 1976)).

Accordingly, it is my opinion that, based upon the facts and legal authorities set forth hereinabove, Profiles has acquired a vested right to continue with its wood chipping operation so long as it complies with all applicable City ordinances. It is my further opinion that, based upon the U. S. Supreme Court's opinion in *Owen v. City of Independence*, announced April 16, 1980, should the City rescind Resolution No. 79-440 and, at this time and upon

these facts, prohibit the approved wood chipping operation, the City could conceivably find itself faced with a federal action in which it would enjoy no immunity from liability and consequently, no limitation on the amount of damages it could be required to pay should its defense in such an action be unsuccessful.

/s/ Donald R. Hall
City Attorney

DRH/DEL/mm

cc: R. E. Anderson, City Manager